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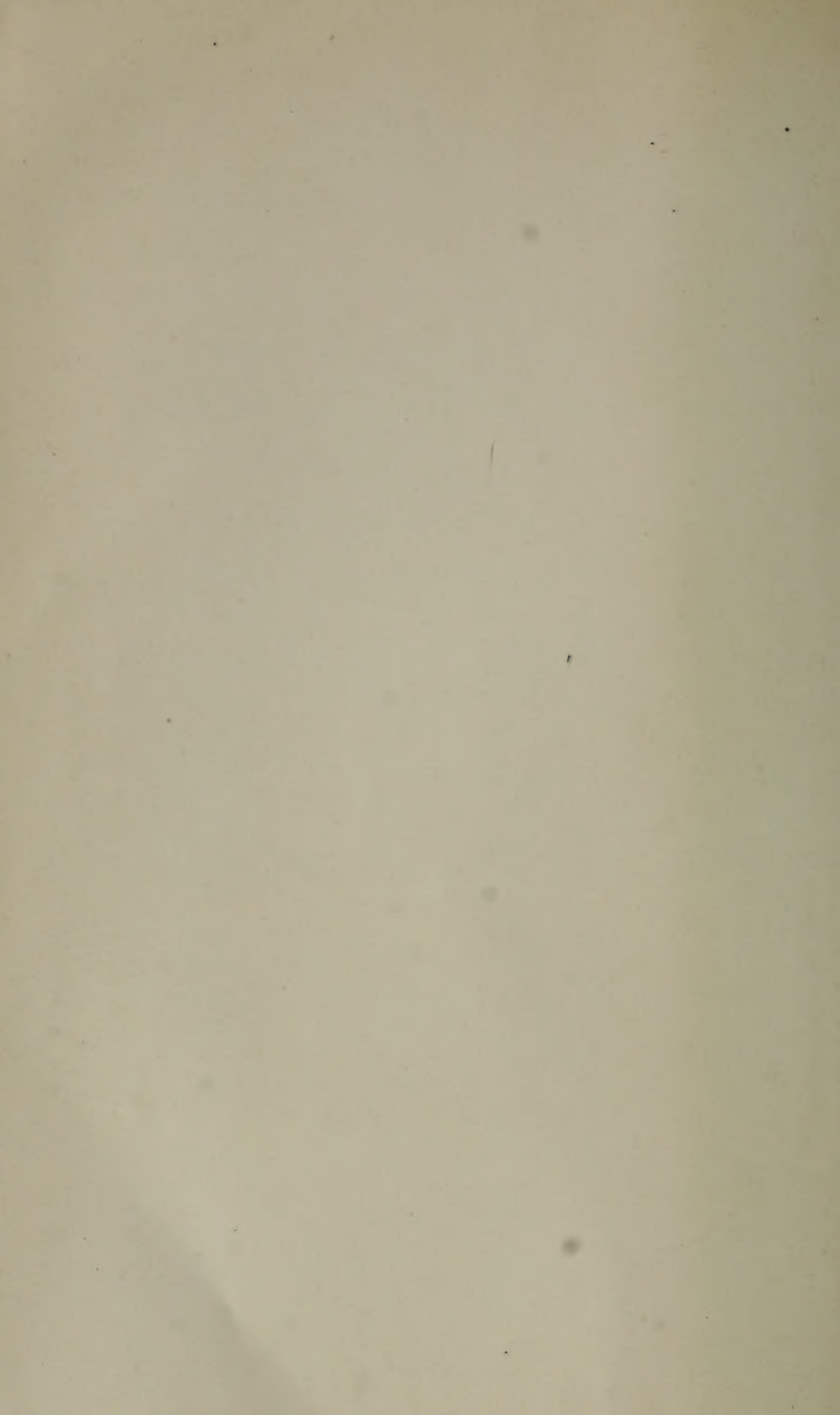
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843
No. 2323

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN FOUR VOLUMES)

LOUIS MASON, L. O. CLARK, JOHANNA
FARLIN, C. C. CLARK, L. P. FORES-
TELL, A. F. BUSHNELL, JOHN DOLAN,
PAT LEROUS, J. T. FITZGERALD, and
ELIZABETH BROWN,

Appellants,

vs.

WASHINGTON-BUTTE MINING COMPANY,
a Corporation,

Appellee.

VOLUME IV.

(Pages ~~1291~~ to 1778, Inclusive.)

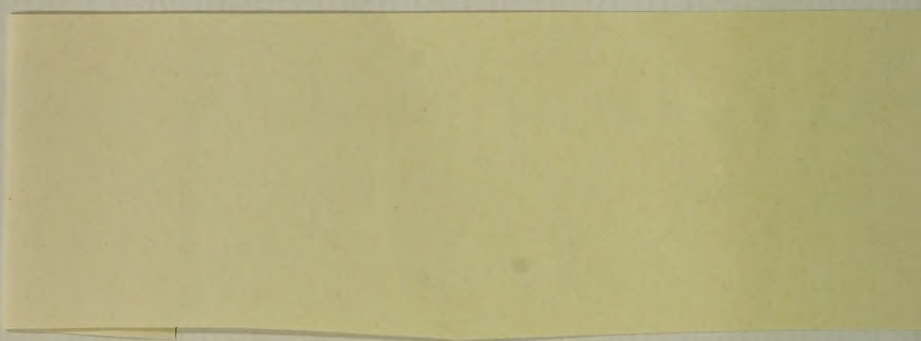
1543

Upon Appeal from the United States District Court for
the District of Montana.

FILED

DEC 4 - 1913

Records of U.S. Circuit
Court of appeals
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(Testimony of Dennis Kennedy.)

with me. [1248] It took me about an hour or an hour and a half to make the examination; I returned to town about four o'clock. Quartz is lead matter, and ore; of course there is different kinds of ore mixed through it; in the case of quartz, you have ore, if it is mineralized, more or less, and in the case of granite you have ore, if it is mineralized sufficiently; you have granite in your ledge very often, and in the case of aplite if it is mineralized sufficient, you have ore. The first thing to be considered with reference to a vein is as to whether you have a fissure or not; without a fissure or without a crevice of some kind it does not make any difference how mineralized the material is, you have not a vein; having a vein, or having the fissure, rather, you very seldom have difficulty in determining the walls; there must be mineralization of the rock,—outside of the walls at times; if you simply have the fissure, pure and simple, with the mineralization confined to the fissure, you have no difficulty in ascertaining the walls; but if, on account of the mineralization of the country outside of the walls of the fissure, and then going back as far as the mineralization extends so as to make it ore, you have more or less difficulty in finding the walls of the vein; the Anaconda mine has shipped a great deal of the ore that has been in the hanging-wall, also in the footwall, that they never worked for ore before, and really it was good too; it could have been shipped then, years ago, too, just the same; this mineralization extending back into the country, and as you get back from the lead, the mineralization de-

(Testimony of Dennis Kennedy.)

creases; and as this mineralization decreases going back, there may be at times, by reason of the price of copper, when you cannot ship and treat one portion of it, and at another time you could treat and [1249] ship that portion,—we suppose it is that way, any way.

I would not say this country rock altered through mineralization that we were speaking about at noon, was lead matter, in my consideration of a vein. I would sometimes consider matter lead matter even if it is not within the walls of a fissure,—sometimes a little bunch I would call lead matter,—outside the walls of a fissure, if it belonged to the lead; I would call that lead matter and not call this matter that we were talking about this afternoon that is mineralized beyond the walls of the lead, lead matter, because the whole thing is not mineralized; this is simply a chunk or something of that kind that I am referring to, that would be lead matter; I have known of instances where it would make a little bunch of it in the hanging-wall, where it would be mineralized enough so that we could save it. I have known of instances for a short distance where the rock outside of the walls of the fissure, by replacement, became ore, and the boundaries of it are beyond the walls of the fissure,—not to extend down; to make a body inside of the hanging-wall,—in the hanging,—that would look like a leach, mineralized, so we could save it; it is beyond the wall of the fissure; you break into the wall and get into the country rock outside of the fissure; I would not necessarily consider that lead

(Testimony of Dennis Kennedy.)

matter; it would be leached or mineralized enough so that we could save it; I suppose it would be lead matter, if it would be rich enough to save, that is, there would be a certain amount of it,—at that certain spot it would; in that case inside of that you would have a wall; there is a wall between the rest of the fissure and the hanging-wall, that would be the hanging-wall and this matter [1250] outside would be mineralized enough so that we could save it; I would not necessarily consider the boundaries on the outside of the matter, that is so mineralized, a wall or a vein; I would not consider it without it extended on down; I would not call it a regular wall; there would be an outside wall, of course, in the case of a pocket, and in that particular case there would be three walls. In the case of lead matter or vein matter, there is not necessarily any particular brand that must exist in order to make it vein matter; there sometimes is a little leaching that brings such ore as we are talking of now in the hanging; where a lead or fissure goes through granite, some of the vein filling is altered granite, and when the vein goes through aplite, generally you expect to find some of the vein filling there,—the aplite on both sides,—to be aplite altered; the granite or the aplite in order to be lead matter would have to contain ore, have to contain mineral, and by ore I have reference to copper; I would expect a hundredth of one per cent, I suppose, of copper in the granite altered to make it ore,—that would be enough to make it ore. In the examination of shaft No. 1 I found decomposed

(Testimony of Dennis Kennedy.)

granite, which is a shattered or softened condition. Defendants' Exhibit 77 is pretty hard, and this other piece too; most of this fine stuff is what comes from between those chunks, little hard chunks that are always through it. I found little stringers through it. By slip I mean a very small seam; I have known of veins that were very small seams at stages of their existence; there was no course of any veins there that I saw; they were running every which way,—cross-ways; there might have been four; that is, there were four or five slips visible in the No. 1 shaft, running in every direction, which is in granite as a rule, [1251] close to the surface; the shaft is in granite; this hard stuff in it, decomposed granite, is in those ribs, mixed up through the hard granite in little lumps; it is everywhere; I could not say how this hardening occurs, and the softening of the granite, in decomposition, to these hard knobs, without it is from surface leaching, from the water going through there that rotted it; this discoloration, this hardening, this alteration, might have been caused by these waters bearing mineral solutions, but I do not think it did, because it has not ever shown anything out in the country rock of the mineral through the water, but I would not expect that beyond the walls; I would not expect this change to occur in the country rock outside of the walls; my reason for not thinking so is that this change is not visible in the country rock outside of the seam; the same condition does not exist in shaft No. 2; that is a little harder ground in shaft No. 2; there is decomposed granite on one

(Testimony of Dennis Kennedy.)

side, a little decomposed granite; the other side is a cleaner rock. The rock does not look to be mineralized, and the only alteration of its constituents is that it is harder rock; there is a little aplite in it; there is a line of cleavage between the two minerals; there is a little harder rock in the foot side in the east end, more like a boulder in there, more like a boulder of this aplite; I do not think Defendants' Exhibit 30 is decomposed granite. You would find that kind of rock in leads sometimes, close to the surface; you will find that most any place in the country close to the surface; *you will find that most any place in the country close to the surface*, and you would also find it in leads close to the surface; that rock has been considerably altered by the leaching; water principally does that; ordinary water, iron stained; if there is copper in [1252] that, I do not know how the ordinary common water would get in there. I cannot find any quartz in that rock, nor any silica.

You sometimes find material like Defendants' Exhibit 57 in leads; there is a little bit of quartz through it, mixed with quartz, decomposed. There is some material a good deal like that in shaft No. 2; that is quartz mixed with granite, little spots of granite in it; I call that quartz and granite in shaft No. 2. If I saw material like that in place in shaft No. 2 I would have a different opinion of shaft No. 2. I saw soft granite in the Hornet shaft; I saw no mineralized granite there; it was all granite; I did not notice any green staining in the shaft; the walls in the cross-cut looked as if they were a little stained,

(Testimony of Dennis Kennedy.)

but this green staining was not visible right in the walls of the shaft. I did not see any material like that (referring to sample) in the Hornet shaft. Defendants' Exhibit 36 is copper staining,—copper stained granite. I do not think I would call that ore, without there is mineral in that; the stain in it comes from the copper; I do not think there is any percentage of copper in that sample; I do not think that would run anything in copper; there is a little copper in that little piece—the sample,—these pieces here (indicating), this piece here (indicating), and that piece,—if you took that out of it,—you can always put a chunk in and get a sample,—that coloring may go through the entire mass; it would not surprise me if you got six or seven per cent copper in that if you put that chunk in; it would surprise me if the others would. I saw no material like that in the Hornet shaft; it was decomposed granite; still, they could get a little chunk in the sides that I would not see, for that matter, but I did not see any chunks in there.

[1253] Defendants' Exhibit 91 is decomposed granite, and you sometimes find that in veins; you find material like this sample in veins; the decomposition is due more or less to water and atmosphere,—the leaching is where it comes from; I can tell it is granite by the looks of it and the color, and then there is a little quartz in it,—mixed with quartz; I could not tell you how the quartz got in there. There is some quartz in granite; at times you find quartz cut through the country rock, in granite,—where it

(Testimony of Dennis Kennedy.)

is cleaned, you won't find it. I could not say that I saw material like that in the Hornet shaft.

Redirect Examination.

(By Mr. SHELTON.)

The WITNESS.—I have found material like Defendants' Exhibit 91 outside of a vein. I have seen something similar to that in a fault fissure. Defendants' exhibit has been acted upon by mineralizing waters,—the water has colored it iron color. The waters that flow over the surface of the ground carry iron sometimes; the iron stained rock similar to that, is sometimes found outside of a vein; that material looks like country rock; that looks like a rock we get close to the surface, until we get down a piece. You find material like Defendants' Exhibit 30 in a vein, and you will find it in the country, find it both places, and close to the surface, at all times here; it might be from a vein or it might be from the country rock; it is not easy to take a piece of iron stained rock like that and tell where it came from simply by observing it; it does not look like it carries any values. The sample you show me is porphyry; this piece here (indicating) resembles it a little bit.

[1254] The rock in the oxidized zone of a vein and which is iron stained does not differ in its appearance very materially from the altered aplite and granite that is also iron stained and is found in the cracks near the surface of bedrock; if I saw them in the place they came from I could tell whether they came from a vein or not; in the oxidized zones in the veins, the rock does not generally show the copper

(Testimony of Dennis Kennedy.)

value. This bastard quartz in shaft No. 2 resembles the quartz of a vein a little, in color,—in its whitish appearance; if you take that rock near the surface, stained over with the iron stain that comes from the surface waters, it is not always easy to distinguish it; that material is country rock, as a rule; if that was in a ledge we would call it ledge matter, and if it was not in place it would be ledge matter just the same, but not in place; it might be ledge matter if it was in a ledge where it forms a vein; I saw material in shaft No. 2 that resembled it. I could not tell simply by its appearance whether that came from a vein or not; I could not tell whether it carried any particular values, or whether it came from a vein or not. Anything that has got mineral in it is ore, but it would not be ore if it was not commercial value. In one place in the Anaconda vein there was a mineralization beyond the original walls of the fissure, and the ore had a light, white appearance. I saw the dark colored specks in Defendants' Exhibit 113,—very little,—big as a shot in places; the material mineralized beyond the walls of the original fissure of the Anaconda vein ran from four to five per cent copper; I saw nothing south of the hanging-wall of the Mullins vein in those cross-cuts that looked like this material.

[1255] Recross-examination.

(By General NOLAN.)

The WITNESS.—The material shipped from the Anaconda on the hanging-wall and into the country was of a whitish color, soft granite.

(Testimony of Dennis Kennedy.)

Q. Well, there were black specks. You say they were not so large as the spots in the sample Defendants' Exhibit No. 133?

By Mr. SHELTON.—No, that is not what he said. We object to that as assuming something that the witness did not say. He said it was lighter, the sample I showed him with the black specks removed.

The WITNESS.—It did not resemble Complainant's Exhibit 31; that is granite; I don't know whether the black spots are removed from that or not,—there are still black specks in there, and as large as marked in the piece of granite that I have been examining here; it looks much the same, only of a softer nature; I have no difficulty in telling that is granite; there is considerable difference between it and Defendants' Exhibit 113,—this is a little lighter; the material shipped from the Anaconda was lighter than that; it had no green shade in it,—that has a green shade in it,—outside of that, that is pretty near as light, and taking away the green shade, the sample resembles in appearance the material that I shipped from the Anaconda; it is not quite as light, that is all; I saw material like this green shaded material in the cross-cut of the Hornet; I saw it all through the cross-cut, on both sides and on the bottom, in both cross-cuts; you will see that all through it. I saw a little cuprite,—oxide of copper, in the examination I made there, in the sides, a little bunch, small pieces; I did [1256] not see any of this red-looking stuff that I said would increase the value of the sample.

(Testimony of Dennis Kennedy.)

Redirect Examination.

(By Mr. SHELTON.)

The WITNESS.—If I had seen a little of that reddish material in either of these cross-cuts, that would not have affected the opinion that I gave as to whether it was a vein or not.

Recross-examination.

(By General NOLAN.)

The WITNESS.—It would affect my judgment if there was enough of this red stuff there to form a vein; if I saw an inch of it, extending as a stringer right from the Hornet discovery shaft on through for twenty-five feet, crossways, or north and south, I would say it was a leader from the vein; it would not be a regular vein. I would consider it vein matter if it had the stringers through there; if it had a little ore in it I would consider it vein matter, but it would not be the regular vein. If the stringer existed there and connected with the vein, it would be a stringer from the vein, but whether it did or not, I did not see it there, and it did not enter into my calculations at all in giving standing to that material.

Redirect Examination.

(By Mr. SHELTON.)

The WITNESS.—When I use the term stringer I mean something connected with the vein, dipping away from the vein. If I had [1257] seen a little fissure or crack on the north side of the Hornet shaft, extending part ways across the shaft and having a very narrow width and being traceable in a northerly direction, almost flat, disappearing into the bot-

(Testimony of Dennis Kennedy.)

tom of that cross-cut a few feet from the Hornet shaft, that would not alter the opinion I gave as to whether there was a vein in the Hornet shaft or in that north cross-cut.

Recross-examination.

(By General NOLAN.)

The WITNESS.—I never did any prospecting, and never located any claims.

(Signed by witness before Examiner February 19, 1912.)

[Testimony of John Mills, for Plaintiff.]

[1258] JOHN MILLS, duly called and sworn as a witness on behalf of the complainant, testified as follows:

Direct Examination.

(By Mr. SHELTON.)

The WITNESS.—My name is John Mills. I live at 805 West Mercury Street. I did the work in shafts 1 and 2 that have been referred to; about the first week in December of last year, referred to on Complainant's Exhibit No. 14,—No. 1 is the westerly one of the two shafts, and when I did the work I took the measurement of the depth of the shaft; when I began the work No. 1 shaft was twelve feet deep,—I measured it exactly, and at that time the bottom of the shaft was in bedrock,—it looked to be about three feet in bedrock, and I sunk it six feet deeper, and when I got through it was eighteen feet deep; the bottom of the shaft was perfectly clean when I began work, and I sunk in solid rock. When I went to shaft No. 2 it was nine feet deep—I measured it,

(Testimony of John Mills.)

and when I went there there was no cave or filling in the bottom of the shaft; I sunk it seven feet deeper, which made the total depth of that shaft sixteen feet.

Cross-examination.

(By General NOLAN.)

The WITNESS.—I was down to bedrock when I started to sink shaft No. 2 deeper; when they came to bedrock they quit,—it was not six inches in bedrock; I did not measure to see if it was an inch in bedrock; the bedrock came in from the northeast corner of the shaft, and as soon as the shaft,—what you [1259] call the shaft,—came into the bedrock, they quit. Now, this corner might have been a foot or eighteen inches into this bedrock, right into the black soil or sand, but when they come to the bedrock they quit,—what they would call the shaft. When I commenced to sink there was not any mineral that fell in; it was perfectly clean; there was not any wash on the bedrock at all; the shaft was cleaned clean, just like as if somebody had worked there a short time ahead of me, cleaned the shaft out, and there was one set of timber in, with one inch boards for lagging, and it looked like it was done just a short time before I went there, because the boards were all white and clean. There was no wash deposited in Shaft No. 1; somebody had seemingly been working on the shaft a short time before I went there; I don't know who it was; I worked about four days on each shaft for Mr. Kemper; I run a little cross-cut for him, but it was all in the same time;

(Testimony of John Mills.)

that is all I ever worked for him.

Redirect Examination.

(By Mr. SHELTON.)

The WITNESS.—The shafts looked to me like they had been cleaned out for somebody to inspect the shaft, and keep the shaft in order to inspect it any time it was necessary, but I had not seen any work going on there, and I did not see any fresh earth thrown out on top; you see, it had snowed before that, and it was all over snow before I went there to work. The earth in the bottom of the shaft looked as though it had been shortly worked on,—it had a fresh appearance.

(Signed by witness before examiner February 17, 1912.)

[Testimony of Simeon V. Kemper, for Plaintiff.]

[1260] SIMEON V. KEMPER, duly called and sworn as a witness on behalf of the complainant, testified as follows:

Direct Examination.

(By Judge BOURQUIN.)

The WITNESS.—My name is Simeon V. Kemper. I live in Butte, and have for about thirty-five years; my business for the last twenty or twenty-five years has been gardening, real estate, banking, mining and other investments; I am connected with a couple of companies that are engaged in the real estate and mining business now. I am vice-president of the complainant in this case, the Washington-Butte Mining Company. I know the part of the Butte & Boston placer which is in controversy here. I have

(Testimony of Simeon V. Kemper.)

known the ground somewhat since 1877 and '78; I have known the ground intimately since 1890, at which time I was one of the locators of the placer claim on the ground,—the Butte & Boston placer. I remember about the time our mineral application was made for said placer, which is in evidence here as May 11, 1891; I only remember it closely by the dates of the papers, but I remember the occurrence; before that date I had not made any very detailed examination; however, I had been all over the ground. I assisted the United States deputy mineral surveyor in surveying that ground, and I had examined the ground in some parts closely in the fall of 1890. Along about May 11, or before or after, 1891, or both, I was out on the ground; I had some work going on over there; I had work going on there in April, and I think the early part of May; I don't know just when they quit. In April, 1891, I was in Washington, D. C., New York, Chicago, and came back to Butte about the 28th. [1261] I paid a lumber bill in July for material that went out there and went into a shaft after I got back and I think the lumber went out there in May or June. After I returned from the east I went out there to see what work was being done, how it was getting along; there were men working there, and they quit shortly after that, about that time, on that shaft; the whole summer of 1891 I was out there off and on. It was in the spring of 1891, when it was filed, I presume, that I first discovered the fact of the adverse claim having been filed against the Butte & Boston placer

(Testimony of Simeon V. Kemper.)

on behalf of the Point Pleasant and the Pleasant View lode claims; I know I visited it a number of times during that summer; I cannot give the dates; every time I went out there it was for the purpose of examining the workings, and I made careful examinations of those workings; I observed that there were several shafts sunk to bedrock on the eastern portion of the ground in the summer of 1891,—I remember distinctly the first day I saw it was quite a warm day; it had been sunk there before I saw it, and they were about eight or ten feet when I first saw them,—some of them were to bedrock; they were scattered around there, and I cannot at this date, identify any particular shaft that I saw at that time as the Hornet, as I know it now, but there is no question but what that was one of them. The shafts that I saw there in the summer of 1891 could all be sunk without a windlass, and the depth would not exceed twelve feet; there may have been one or two there a little more than twelve feet, but the shafts looked like the average shaft that was sunk,—would be sunk by one man without a windlass; I will swear that there was not a shaft on the ground to exceed eighteen feet during the summer of 1891. My inspection of the Butte & Boston placer during [1262] 1891 was sufficient to acquaint me with all the shafts on the ground; I had reference in saying there were no shafts on the ground deeper than eighteen feet, to the workings on the east end of the ground that I spoke of; I had some shafts sunk there in the gravel on the western portion deeper than that.

(Testimony of Simeon V. Kemper.)

Mr. Mason and his associates sunk the shafts on the eastern portion of the ground I speak of. There were no vein showings in any of the shafts on the Butte & Boston placer; where the shafts had reached bedrock the material exposed in the bottom was granite. I descended into them for the purpose of examining them, and I found some good looking float at one of them on the dump and I went down to see where it came from,—the character of the ground; that must have been the Hornet shaft, because I have observed the same material there since. There was no shaft with a bench in it at that time; the first time I observed that bench in the Hornet shaft was in 1901, when we were getting ready for the suit in the district court. I do not know what time in the year; it may have possibly been in the winter of 1890. It was after we found that Mason and Merri-man were working on our ground, and I am not sure whether that was in the late fall or early spring. I remember examining the Pleasant View discovery shaft for the purpose of determining whether there was a lode or lead or vein therein; the first time I had an opportunity to examine the virgin ground, or the ground that had not been caved in, was in 1894 or 1895, and there was no lead there; there was some float in there, some green stain, and there was a boulder in the bottom with an apex—looked like an apex of a vein, or a roof-shaped rock, that I supposed that Mr. Mason and his associates were intending to claim as a lead, and such a claim was made to me by Mr. Mason; [1263] he and his associates claimed they

(Testimony of Simeon V. Kemper.)

had a lead there; Mr. Mason claimed there was a lead in the Pleasant View shaft prior to the determination of the adverse suit in 1895; he did not at that time, in 1895, know that there was any other lead, but he told me at times that he thought a vein might be found out there some day. He did not make any claim prior to 1900, of any other lead, lode or vein on the Butte & Boston placer than that he claimed in the Pleasant View discovery; we probably had a conversation at the Parrot,—I had a number of conversations with Mr. Mason; he was renting a house from me, and I had occasion to talk to him quite often, and the conversation you refer to, no doubt we had, but at that time I did not tell him that there was a lead out there,—that might have been any time before 1897. There was good float out there, but he had no lead to win a case on; he knew nothing about veins, and he was absolutely ignorant of leads, and I knew what a lead was, and I told him so. I told him he was calling float a lead; this was probably some of the conversation had at the smelter; I cannot detail these conversations. I am familiar at this time with all the workings on the Butte & Boston placer. I have examined the deep shaft, No. 21, and it is about five or six feet deep; it looks like decomposed granite exposed by the work in bedrock; there is a great deal of material there that looks like a fault; I don't know what to call it, whether stratification or what you may term lines running northerly and southerly,—that indicates a north and south fault. I have also visited shaft 1, and I observed it

(Testimony of Simeon V. Kemper.)

before it was sunk deeper by Mr. Mills in December, 1911, and the material exposed in the bottom of that shaft at that time was granite, and it is granite since it has been sunk deeper by Mr. Mills; there is nothing therein in the way [1264] of a lead, lode or vein. Shaft No. 2, at the time Mr. Mills started to sink it deeper in December, 1911, showed bedrock; there was nothing in the way of ore or a vein or a lead; it showed a little firmer bedrock after he sunk it deeper, and the material in the bedrock was granite and aplite. Tunnel 30 is in bedrock; the character of the bedrock throughout that tunnel is a very much mixed up, broken up material; there is a good deal of aplite in there; there is no lode or vein in that tunnel. I observed the vein exposed in the north cross-cut and a little farther in in tunnel 31, and I observed the faulting that is conceded to exist in the tunnel about fifty to sixty feet beyond the northerly cross-cut; I did not measure the distance, only I know it is in the tunnel; that fault cuts off the vein west of it; a little beyond the main fault that you speak of there is something that looks like a vein on the north side of the tunnel, and that seems to be cut off by another fault; that last fault mentioned continues diagonally into the face; it is on the south in the face; I have reference to the fault crossing the face diagonally,—runs into the face of the tunnel. I also observed the country in the north cross-cut outside of the vein that is exposed therein; I noticed very little green stain in that; it is granite, altered some; I think I found two or three little spots there; there

(Testimony of Simeon V. Kemper.)

is not much. I observed the material in the southerly cross-cut near the face of the tunnel 31, and there is no evidence of staining with copper therein. I went down the Rabbit discovery shaft and saw a little tunnel started to the west, hardly big enough to dignify by the name of tunnel, hardly large enough, in there; there was a little streak of, or a little seam with some green staining in it, as big as my finger; there was not [1265] enough shown to distinctly show the course; it seemed to strike toward the south or southwesterly; I did not observe it crossing the shaft at all. It seemed nearest to the south side of that little projection at the bottom of the shaft,—I mean the south side of that excavation in the west side. There is no stain to speak of in the country rock in the Rabbit discovery shaft; there is a little streak that has some stain in it; the country rock in that shaft at the bottom is granite. I did not take the course of the vein in the north cross-cut of tunnel 31 with an instrument; I observed it, that is, casually; in going easterly it bore to the south.

I went down shaft 3, and on Defendants' Exhibit 1, marked shaft No. 9, and entered the cross-cut to the north and observed streaks in there they call veins,—may be a vein; the first one, on going toward the north, was about an inch or two, possibly less than an inch in some places. It first appeared in the cross-cut four feet from the timber; beyond it lay the granite,—was a little more altered, and a few feet to the north of it there seemed to be another streak or seam; there is no lead in the shaft; the country rock

(Testimony of Simeon V. Kemper.)

in the shaft and the cross-cut connected with it is granite; in the shaft itself I did not observe any green staining; there is some green stain in the cross-cut that I mentioned and also in the cross-cut below the one I mentioned. The cross-cut below appears to be a cave-in; I don't know what it is; I did not see the work done; it may be a cave, or it might have been originally a cross-cut; it is a large opening to the north, and it has a slip or fault that bears northeasterly and southwesterly, or nearly northerly and southerly, with considerable dip to the west, and there is very little green staining visible in that lower working. [1266] I did not visit the Vesuvius shaft and workings. I was down in shaft 19. When I was in there the bottom was covered with loose debris that had caved in and the top of bedrock was perhaps nearly as high as my head, say five feet; there is no lead, lode or vein in there; there is some granite, some little patches of quite green-looking granite, and there is considerable crushed up matter; there is clay faulting matter. There was the clay crushed-up material in the apparent course of the streaks running northerly and southerly in shaft 19 which indicated faulting; by the streaks I mean the planes of the fault itself,—the lines that were marked, and their course was northerly and southerly; I did not take their direction. Tunnel 35 is mostly in wash, in the east end of it,—the face is a few feet in bedrock, about two and a half or three feet; it looked to me like aplite; there is no lead, lode or vein in that. In tunnel 36 I observed the same

(Testimony of Simeon V. Kemper.)

kind of bedrock, only a great deal more of it; tunnel 36 runs in a great deal farther, and it has several branches; I visited all of its branches; there is no lead, lode or vein in that tunnel or in any of its branches or workings. I have been in tunnel 37, that being the tunnel below the mouth of the Hornet tunnel, and found granite and a little aplite; I observed a little green stain in the cross-cut toward the north running under the entrance of tunnel 34; there is no lead in that cross-cut or in the tunnel. I have been in tunnel 34, the Hornet tunnel, and through it and been down the inclined shaft, saw them stoping in there, and have followed the vein in the Hornet tunnel to the face of the tunnel, and the walls of that vein are clearly defined; the hanging-wall, with reference to the tunnel itself, is on the south side; in most of the way the [1267] south wall of the tunnel is the south wall of the vein, which is the hanging-wall; that wall is granite, and it is well defined. I have been to the bottom of the Mullins winze, connected with the Hornet tunnel,—that inclined shaft,—I was one of the interested parties when we sunk that shaft, and we let a contract for a hundred feet, and that,—I don't know how deep that shaft is sunk. Mr. Mullins sunk that after this hundred foot contract was finished; there are workings below the floor of the Hornet tunnel connected with that inclined shaft,—there has been some stoping done from the inclined shaft westerly, and now there is a cross-cut in what is called the Hornet shaft northeasterly, tapping the west end of the stoping from this inclined

(Testimony of Simeon V. Kemper.)

shaft; that working was quite extensive, extending down to the bottom, but it has been filled,—the stopping extends to the bottom of the shaft. I have been to the bottom in the inclined shaft and the stopes connected with it; there is a vein all the way from the floor of the tunnel down to the bottom; at the bottom it almost peters out, that is, its values decrease; it was the same vein that is in the Hornet tunnel; the walls as I went down that inclined shaft were well defined, and consisted of granite. I broke in through the material bounding the walls at depth in the inclined shaft, and the character of the material there was granite, and there are some stains in the cracks; other places it is not stained much, very little; there is more staining at bedrock and less staining below; the vein is about the same size all the way down in the shaft, about four feet, at the bottom, but the values decreased to such an extent that they quit sinking. I have also examined and observed the cross-cut from the Hornet tunnel to the Hornet shaft and down the shaft, and to the [1268] cross-cut back northerly, and the material exposed in the upper cross-cut from the Hornet tunnel to the Hornet shaft is granite. Complainant's Exhibit 31 to 36, introduced here as being brought from the workings connected with the Hornet Discovery shaft by Mr. Linforth, look like an average sample, a fair sample of the country rock through that cross-cut,—the material in which the Hornet shaft is sunk is country rock,—granite; there is some mineralization there, and some seams that have been stained. There is a

(Testimony of Simeon V. Kemper.)

crack, a seam, that is stained up somewhat with chrysocolla, and sometimes you find a little cuprite on the east side; there is another one on the west side, and possibly just a little lower, running almost horizontally toward the north or northwest side of the shaft; it seems to bend up a little, and on the northwest side,—what we have been calling the north side here,—about the juncture between bedrock and wash, there is considerable stain; this seems to lay across horizontally east and west; this first horizontal seam that I mentioned, is below the floor of the upper cross-cut, three or four feet; the other one is just about nearly opposite, I guess; it is a little below the floor; on the southwest side that seam is just a crack; some places the stain has extended, making it appear wider than it appears in other places. Those seams are not veins. I observed in the upper cross-cut, going from the Hornet shaft, special mineralization; there is a fault showing in the south,—or in the east side of the bottom of the cross-cut running from the bottom of the Mullins tunnel to the Gulf shaft; there is more staining in that; there is some what they call chrysocolla and more staining in that than there is on either side of it; I found cuprite there,—I am not sure, but I think I have; that fault runs northerly and southerly. [1269] You can get cuprite in spots or places in that upper cross-cut; I think I found cuprite on the west side of that cross-cut,—very small pieces. I have not made an examination of the geological character of that country, knowing that there were geologists who were doing that, and

(Testimony of Simeon V. Kemper.)

so my observations have not been as close as they would have otherwise been; there is some little cuprite there; I remember distinctly, now, of finding on the west side of that upper cross-cut, say a foot above the floor of this cross-cut; it is in very small quantities, and I hardly know how to compare it in quantity,—very small pieces,—some as large as a pea; I observed it along just at the top of bedrock; you might find it most anywhere in there, in very minute particles; there is considerable green staining in some spots. There is not as much of that cuprite visible now as before this hearing opened; it is very nearly all dug out; the last time I was out there it was hard to find any; I don't know of anything else in the Hornet shaft in the way of mineralization,—some little green stain; there is a little pocket or patch of green stain in the southeast corner, not very far above the bottom; I have mentioned the most stained parts in that shaft; I do not know that there is any other stain in it; there is stain in the places I have spoken of. I observed the little drift southwesterly from the bottom of the shaft; that is in granite; there is no mineralization in there; I did not see any staining. The lower cross-cut northeasterly from the bottom of the Hornet shaft to the workings on the Mullins vein or Hornet vein, below the Hornet tunnel, is all granite;—very much more solid than the cross-cut above; there is one place there are two little streaks in [1270] there where I found cuprite on the east side; one of them is about three, possibly three feet,—I did not measure any of them,—

(Testimony of Simeon V. Kemper.)

from the stoping,—and the other one is maybe about a foot or eighteen inches more; those are in the cross-cut; the first one is about three feet from the vein, and the other is, perhaps, about eighteen inches farther; there seems to be a crack that has been filled from percolating mineral waters,—looks that way; I do not know what the strike of that crack could be; it is more horizontal than it is perpendicular, and it leads downward toward the Mullins vein; I am talking about the cracks in the granite. I observed the fault mineralized just beyond the end of the cross-cut in the drift along the vein, at that point; I did not take the course of that fault,—it is northerly and southerly; it is mineralized some; it seems there are deposits of some character in it of chrysocolla. In the lower Hornet cross-cut there is a lead where the stoping has been done, but there is none between there and the Hornet shaft. The stoping has been done on the vein in the Hornet tunnel. I remember an injunction hearing in the state district court in this county between the Butte Land & Investment Company and Mr. Mason and others in 1901; when that hearing commenced there was a connection between the Gulf shaft and the Hornet tunnel,—the Mullins tunnel,—whatever you term it. It was run the balance of the way from the Gulf Discovery shaft to the Hornet Discovery shaft during that trial. I have seen the maps marked Defendants' Exhibit 2, No. 9,000, which has heretofore been testified to as having been introduced as an exhibit at that hearing by Mr. Mason and his copartners. The blue-print you hand

(Testimony of Simeon V. Kemper.)

me was taken from that tracing; it was taken in the east window of our office, State Savings Bank [1271] Building.

By Judge BOURQUIN.—We offer it in evidence for the purpose of showing the condition and extent of the workings in 1901.

The EXAMINER.—I will mark that Complainant's Exhibit No. 44.

The WITNESS.—When I located the Butte & Boston placer, there was no quartz mining being carried on in that part of the Butte district; the main mines were on the west side of the creek; the Silver Bow mine was perhaps the nearest to the Butte & Boston placer; that was something over a mile or a mile and a half,—about a mile. At the time I visited the Pleasant View Discovery in preparing for the trial of the adverse suits, I encountered Mr. Mason; in getting ready for that adverse suit, I took some witnesses, five altogether, the hack driver and myself and three witnesses, and went out there to examine the Pleasant View Discovery shaft, and I found Mr. Mason out there. He said that we could not go down, and I told him that I had brought those witnesses out there to examine that shaft, and that they were going down, and I argued the question with him, told him there was no use to try to resist, that there were five of us and only one of him, and told my witnesses to go ahead, and I would take care of Mr. Mason, and two of them went down; he was guarding the shaft at that time; there was no ladder there; I cannot remember how we went down, but it seems to

(Testimony of Simeon V. Kemper.)

me we went down on a rope, but I cannot remember how it was, next to the top; there was no windlass up there and no ladders. We did not attempt to go to any other place, and he did not assume to be guarding any other place; there was no other place in question at that time; that was the only place that was claimed there was a lead,—the complainants in the adverse suit claimed there was a lead. Mr. Mason was claiming a lead in the Pleasant [1272] View shaft; he did not talk of anywhere else.

Cross-examination.

(By General NOLAN.)

The WITNESS.—I had been pretty active in business in Butte before 1891, engaged rather extensively in different things,—mining, placer mining and quartz mining, and other enterprises, and I was also engaged in the real estate business. In 1891 I owned considerable real estate in the city of Butte, and a reasonably fair proportion of this real estate was land that, whether by me or somebody else, had been acquired as placer ground, and at that time I was quite active, and quite vigilant in looking around Butte and the neighborhood of Butte for unoccupied land to get title to it, and in 1890 I had knowledge of the existence of this land over there that is now in controversy. The first I learned of the Pleasant View and the Point Pleasant locations was when I was talking of patenting, trying to,—I did not know,—I do not know just what date, but it was when I started in to doing something,—getting a patent,—whether it was after we had it surveyed or before

(Testimony of Simeon V. Kemper.)

or afterwards, I am not sure about that; it was about the time the survey was made. I went on the ground before I made the application for patent, and had it surveyed; application for patent was sometime in the spring of 1891, in the winter,—there was snow on the ground. I put a notice on the ground there in December, 1890. I do not remember that when I first made the application for a patent, there was a rejection of my application. I made an application for placer and clay; I do not remember being advised that the clay did not go, and that enough was not done upon [1273] the ground to authorize the office to accept the application at that time. Mr. Gillie at that time was acting as my attorney in the proceedings that were instituted by me to get title to this ground, and Mr. Wilson was employed by me to make a survey of the ground, before I made the application for the patent, and I was upon the ground with Wilson at the time that he made the survey, and about that time I learned that this ground was located by the claimants of the Pleasant View and the Point Pleasant. I never was in the same office with Mr. Passmore; I owned the business that Mr. Passmore has, and sold it to Mr. Passmore in 1889, and I worked for Mr. Passmore on a salary for thirty days, until he got started, until he learned something about the town; he was a stranger then, and I went to the coast; I was not here in the winter, and I returned in March or April, 1890; when I put my notice upon the ground in December, 1890, I did not know that anybody else was claiming by reason of any pre-

(Testimony of Simeon V. Kemper.)

tended location of the ground, but I knew that fact before the 11th of May, 1891; I don't know just when I found out about that; Mr. Passmore told me, I think it was; it may have been after it was surveyed that I discovered that there were locations there,—quartz locations; we did the work right then when we put the notice up in 1890, in December; we sunk a shaft there; I have forgotten the depth of it, about six feet, I guess,—went through frost; I located a great deal of ground around here; I did not know whether I would get good results from it or not; we never operated this ground as a placer other than representation work; I was acquainted with the corners all over this valley from here south ten miles; I knew the surrounding claims too, and examined them. I don't know just what you mean by being pretty watchful in reference to the condition of [1274] the ground in the immediate neighborhood of Butte in 1890, but I had confidence in Butte's future, and where I could find something that would give the prospect a future value, I would take it up. While there were no quartz mining operations carried on in that portion of the country adjacent to this ground in controversy, I knew, of course, that a great many quartz locations were being made and had been made up to that time, and I knew something of the records, and knew some of the locations over there in the neighborhood of this ground in controversy in December, 1890. There was a man by the name of Booth told me there was some vacant ground over there, and I looked it up on the map and concluded

(Testimony of Simeon V. Kemper.)

to go over and locate it, and located him in on it. At this time, I remember knowing of some of the locations over there at that time; I remember the Lily and the Pacific; I remember something of it. I knew that there were some quartz locations, and a good many of them, over there, and that the ground unoccupied was covered to a large extent by quartz locations. The general idea at that time, when we located that ground, was that the veins ran north and south up in the immediate vicinity of this ground. We could not find a lead to locate on. There was no lead by which we might discover, by which we might locate the lead. That is to say, at the time I, at the instance of Booth, had my attention directed to this ground, and desired to pick it up, had known of any leads upon it, we could have located it as quartz, possibly would; we were prevented from locating it as quartz claims by reason of the fact that we did not see any leads upon which to make a location; we made a close enough observation of the ground at that time for the purpose of enabling us to act in that direction,—we went all over that ground.

[1275] I don't know how close the bedrock comes to the surface on the easterly portion of the ground; it has been demonstrated since that it is not very deep. I knew there were no cuts upon the easterly portion of the ground, before that time, where leads were disclosed; I would have found them if there were. Mr. Booth did not give me the boundaries of the tract he spoke to me about; I immediately looked up the boundaries; he pointed to the map in the office

(Testimony of Simeon V. Kemper.)

and said there was a vacant piece of ground over there,—we had the conversation in his office. Located claims do not usually show upon those mineral maps. We saw claims that had been surveyed, and they were on the map, and there was some vacant ground over there; he told me about it, and I went over and looked it up,—I went over the ground; you cannot tell from a map whether ground is located or not; I don't think that was very long before I put the notice of location upon the ground,—I think it was the same month, probably. The location notice was put on the ground on the 20th day of December, 1890, by myself; I do not remember what I put in that notice,—I would have to see the notice; at that time I did not notice the corners of these two locations, the Pleasant View and the Point Pleasant; I may have seen the corners; I may have noticed the corners, but not to know they were the corners of that; there are odd stakes and stray stakes scattered all over this country; they were much worse then than it is now; people would make a location and abandon it, and a stake might be left there for ten years. If I had seen a stake that would properly indicate the claim to which that stake belonged, I would have looked it up; my principles were such that I would never locate a piece of ground that somebody else was claiming, and if I had seen a stake there that would [1276] indicate it was claimed by somebody else,—I have passed by many a claim where I knew it was spurious. There was a notice posted by or near the Pleasant View shaft, but I did not see that at

(Testimony of Simeon V. Kemper.)

the time I located it,—I found it afterwards.

I was out of the state in the spring of 1891, and returned from the east about the 28th of April, 1891; I was gone something less than thirty days; I don't know just what time I left here. Some work was being done by me upon this ground before the 28th of April, 1891, and undoubtedly before any work was done at all, I was upon the ground and observed where these shafts,—representation shafts, would be sunk, and one of those shafts was in close proximity to the Pleasant View discovery, something less than a couple of hundred feet away,—it was something less than a couple of hundred feet from the Butte & Boston placer discovery; there was a shaft very close to the Pleasant View discovery, but I do not think it was sunk at that time; it was a subsequent year to that that that shaft was sunk; the nearest shaft that I sunk in the spring of 1891, to the Pleasant View discovery, as I afterwards knew it, would be more than a hundred feet; it was northerly,—more than two hundred feet. I do not believe you could see the Pleasant View discovery dump from that point; I am quite sure I saw the discovery dump of the Pleasant View location before that application was made; when I first saw that hole, as I recollect it, it was partly filled with ice and snow and some water and dirt. I saw all of the hole that was visible long before 1905; it had caved in somewhat; I supposed it was a very old hole; it has been developed since that it was a recent hole dug the summer before; my recollection when I first saw it was that it was an

(Testimony of Simeon V. Kemper.)

old hole, which some prospector had been prospecting; [1277] I did not know what it was for; later I saw that notice stuck up by it; I don't remember whether the hole was timbered; it could not have been timbered or it would not have fallen in so readily. I did not, before the 11th of May, 1891, see the discovery of the Point Pleasant; I found out that there was a portion of the ground covered by a location known as the Point Pleasant, but whether before the 11th of May, I cannot say; I cannot recall just when the complaint in the adverse suit was filed; I was satisfied that some of that country was quite deep in wash, without cleaning it out. I saw some good float at what we call the Hornet discovery now,—float that was along the surface of the ground and that comes out of the hole that was made, and as a matter of fact, I saw some ore on the dump there in 1891. I went into the shaft in 1891, when I saw this ore on the dump there to see whether it came from the discovery or not, and what the character was in the bottom, and I reached the conclusion that it was in wash; I think the ore on the dump came out of just on top of bedrock; it was in the bottom of the shaft; there was considerable float there. I did not measure the depth of the shaft in 1891. In 1895 I made thorough examinations of the grounds there, and I knew by reason of those holes not being to bedrock, that there was no lead uncovered,—I knew there was no lead in the Butte & Boston placer. I gave away a third of the ground because it is always cheaper to compromise than it is to pay lawyers, if you can compromise on

(Testimony of Simeon V. Kemper.)

the reasonable basis, and the expenses of a suit would be accumulating the longer the suit is continued, or the more action that is taken in the suit. The compromise was suggested to save the expense that would be incident to the [1278] trial of the case. I think that is the side they preferred, as far as I can remember; we agreed to denominate it a compromise, but we took judgment in that case, but if we call that a compromise, it was upon the basis of dividing the Pleasant View claim into two halves, and, if I recollect correctly, Mr. Mullins preferred the east half; it was Mr. Mullins with whom the compromise was negotiated in the first place. I don't think the openings and the exposures on the eastern part of the ground had anything to do with that portion of the ground being assigned to the quartz claimants, unless it be that everybody presumed that the bedrock was much deeper on the western portion than it was on the eastern portion, and it may be that the other parties expected to mine it for quartz. A great deal of work was done from 1891 up to 1895 by Mason and his associates on the eastern portion of the ground.

Q. And you don't know whether or not any of those openings made in that time tended to disclose the fact that there were leads?

By Judge BOURQUIN.—Objected to as immaterial, in that any leads discovered after May the 11th, 1891, would not at all come within the category of a known lead.

(Testimony of Simeon V. Kemper.)

A. There were no known veins in that ground in 1895.

The WITNESS.—I will not say that there were no veins there,—that there were no known veins,—the public generally did not know of a vein there, and Mr. Mason did not know of a vein there, and I did not know that there was a vein there in 1895. I have an idea of the number of openings on that ground before May 11th, 1891, but I would not swear that there is three or six or ten; I do know that they did not extend into bedrock; I know that for I have been prospecting for a long time, that is, [1279] having something to do with mines, and I knew what bedrock was; some of them may have been as deep as eighteen feet; I said possibly there was one there eighteen feet deep, and I think that is deeper than any shaft that was on the ground in the spring of 1891. I never located the Hornet ground as quartz. I did not go there during the time men were working on the ground before the 11th of May, 1891. At the time I saw this quartz on the dump there, there were no men working there; the time that I first saw that made an impression on my mind because of the fresh dump up there, and I walked up to see what they were, what was being done. There was no one working there at that time; there was some one with me, but I have forgotten who it was. I don't remember how I got down the shaft; I do not think there was a ladder when I went down the first time,—there may have been a ladder,—I don't know; my memory of some things is in a hazy condition, and

(Testimony of Simeon V. Kemper.)

some things are clear. I did not see Mason working on the ground there before the 11th of May, 1891. I did not do anything with the ground after I obtained the patent after this compromise,—things went along there until I learned of the location of the Hornet in 1900. We did not know that that lead which was opened up there in 1900 or 1901, I believe it was, was there until that time,—the value of the ground as quartz or the value of the ground as placer, or the value of the ground for clay or any other purpose was undeveloped; the value was not established and could not be without development, and we had other ground; I could not work all the ground; we did some work on placer; we did not do any work for quartz; we did no work for placer after getting patent. Someone told me that Mason and Merriman had jumped our ground, the first information I had, and it may [1280] have been Mr. Mullins, and it may have been someone else; I don't know who it was; I got the information, and Mr. Mullins and I went over there. I did not know of the location of a portion of the ground as the Lynnea, soon after the compromise was effected, until a year or two afterwards,—I don't know when I did learn that,—a long time afterwards. I learned of the location of the ground by Kift and Knoyle and of the getting of a bond and lease on the property by Mason; the order in which I learned it was that Mason and Merriman were running a tunnel over there; I did not know about that work by Kift and Knoyle until I went over there and found out about the tunnel; at any rate, I learned

(Testimony of Simeon V. Kemper.)

of this discovery by Kift and Knoyle; they went deeper, or cleaned out the Hornet discovery shaft and run to the west, and I knew that in running that way, and in the material that was there, that they had not any discovery.

Q. And yet, as a matter of fact, you had an arrangement, didn't you, to purchase the interest of Kift and Knoyle?

By Judge BOURQUIN.—So as to save putting in continual objections, we would like to have all this go in under the general objection that it happened at a date that would render it immaterial.

The WITNESS.—I had an arrangement to purchase Kift and Knoyle's interest in that property, and we stood behind Kift and Knoyle in the litigation that was instituted by them for the purpose of cancelling the lease and bond that was given to Mason; we did that because sometimes it is cheaper to settle these things out of court than it is in court; I don't remember the exact amount we obligated ourselves to pay for their interest; I think we paid two hundred and fifty dollars cash; then there was a five-hundred dollar payment to be made when [1281] the litigation was adjudicated satisfactorily to us; that is all we were to pay; we did not obligate ourselves to pay in excess of five thousand dollars; I think the first payment was two hundred and fifty dollars in cash.

Q. That you were then to furnish the lawyers, meet the expenses of the litigation that was pending, and then, in the event that they succeeded in winning in

(Testimony of Simeon V. Kemper.)

the District Court, that you would then pay them a thousand dollars, and then, if the case were appealed to the Supreme Court, and if there was an affirmance of the judgment there, so as to get the property, you would pay them four thousand dollars?

By Judge BOURQUIN.—Objected to as based upon an assumption of facts not proven, and incompetent, and as based upon an assumption of facts not proven.

Q. At any rate, you say that that was not the agreement?

A. No,—as you talk about it, the agreement comes more clearly to my mind. I have forgotten what the first payment was, but I believe it was two hundred and fifty dollars, that all of the owners of the Butte & Boston placer joined in to pay to Kift and Knoyle, and the second payment, when you suggested one thousand dollars, was to be paid when the litigation was adjudicated, or a final adjudication of this litigation favorable to Kift and Knoyle, then there was another provision,—I don't know whether it was four thousand dollars or five thousand dollars, to be paid when patent was obtained upon the Hornet location, if such was ever obtained. That was a stipulation or condition that was inserted in that contract at the suggestion of Kift and Knoyle. They insisted upon it, and they expected to get a patent on that, and consequently never paid any more than the first thousand. Where the five hundred dollar payment [1282] came into my mind was this: I entered into an agreement with Kift and Knoyle on behalf of the

(Testimony of Simeon V. Kemper.)

Butte Lead & Investment Company to get the title to the east half, or I mean the west half of that Hornet, which covers the ground in question here in this case, for a consideration of five hundred dollars. There was a five-hundred dollar payment to be made to Kift and Knoyle by the Butte Land & Investment Company for the west half of the Hornet, in case the litigation was adjudicated favorably to Kift and Knoyle. I knew at the time I entered into this agreement with Kift and Knoyle that there was not any known lead upon the ground at the time of the application for the placer patent, and I knew that so far as the Hornet Discovery was concerned there was not any discovery made by them so as to make their location a valid location,—I knew all of these facts. At the time I entered into this agreement with Kift and Knoyle, this lead was uncovered in the Mullins tunnel. I did not know about the tunnel at the time of the lease and bond to Mason; I did not know that lease was made before the lead in the tunnel was discovered or not; I perhaps knew it, but I don't remember now. This work disclosing the lead in the tunnel was done in 1901; I acquired an interest in this ground that I disposed of as a result of the compromise, so that Mullins and I, after this lead was disclosed in the tunnel, prosecuted this work in sinking this Mullins shaft, and I think it was in 1897, I bought an eighth interest in the east third of the Butte & Boston, which we had parted with in 1895; I bought it from Mr. Mason; Mr. Mason had an eighth interest, and I bought Mr. Mason's interest in

(Testimony of Simeon V. Kemper.)

that year, that he has been trying to get back; I acquired some more interest in that property, which I think was after the litigation was begun in 1901. When the work was [1283] prosecuted in the sinking of this inclined shaft my company and I had an undivided eighty interest in the ground. I have not got the returns from the ore that was shipped before the work was suspended that was carried on by Mullins and me; I was not working it at that time; Mr. Mullins was leasing from the remainder of the owners, and he quit work because he said it would not pay to continue it; I don't know whether he disposed of his interest for thirty thousand dollars; it is possible that we did not value the vein and the ore therefrom as highly as our adversaries. I have not been acquiring interests in these quartz locations since then; I did not acquire the Merriman interest; our company acquired an interest; I think it was a twentieth, I am not sure, through a man by the name of Bushnell, contrary to my advice. The Washington-Butte Company has no other interest or is not connected with any other interest than in the locations claimed by the defendants in this case at all; that was the Butte Land & Investment Company that put up the money for Mr. Bushnell to buy a twentieth interest, but Mr. Bushnell never deeded the property so far as I know; the Butte Land & Investment Company advanced the money, as I have learned, since I returned from the east; that is the only interest acquired by any company with which I am connected, or by myself, in this property in controversy, in the quartz

(Testimony of Simeon V. Kemper.)

location made in 1900; I am the principal stockholder of the Butte Land & Investment Company; there are some stockholders outside of my relatives, holding a nominal amount of stock,—small amounts. I learned sometime in 1891 that the Pleasant View and Point Pleasant locations were recorded; I think it must have been before I filed my application for the placer patent. I saw some ore on the Hornet discovery dump in the [1284] summer of 1891; I am not going to say I saw it in sacks, or did not see it in sacks. In talking about this matter I am not sure. Maybe I saw sacks there and maybe I did not. I saw sacks somewhere. It may have been on another piece of ground. In 1891 I was representing and patenting something like twenty different claims; the material I saw there on the dump was of the character of the material that we have in some of the exhibits here as being taken from that shaft now; there was cuprite in it; that attracted my attention; when I saw this material on the dump it was in hot weather; it was not there when I put men to work on the ground, which was before the 28th of April; before I went east I started some men at work on a shaft, and I have forgotten what men they were; I have been trying to figure out who they were, and I cannot; I was working on different claims at that time, maybe a half dozen at least, and I don't know what men were working on that shaft, but I started the work just before I left; I do not remember how much work was done at the time I made the application for the placer patent; I don't think it was all of

(Testimony of Simeon V. Kemper.)

it; I make that point blank. I think there was quite a good deal of work to be done, that is, I am speaking of the amount of work required to be done to obtain patent. We sunk a shaft below the Pleasant View discovery; the Pleasant View discovery is in a little hollow, little draw, little ravine, perhaps thirty feet,—guessing at it, possibly twenty-five feet; we sunk a shaft, and intended to sink it ten feet deeper than the Pleasant View; I don't know just when we sunk that, but it was not early in the spring of 1891; none of the shafts I had sunk were down to bedrock. I think there is a fault in shafts 19 and 21, but I am not sufficiently up in mining to determine whether or not [1285] there is any walls to that fault showing there or not; I think perhaps it is a fault,—a fault would be a fissure, and the material that is there is the material you find in a fault fissure, and there is bound to be some copper in it, considerable iron in there in some places; I would say there is not any other metals carried in the material that is there,—that is, I did not analyze it, and I don't know, but it appears as though it is barren; these fissures that are exposed in those two shafts are north and south fissures; not having seen the walls, I am simply enabled to form that conclusion by the way in which the material lays there,—the lines that are there are running northerly and southerly; there are a good many of those lines there; there are planes there which, some of them are not exactly parallel with the others, but they all tend north and south and they show, evidently, that the direction of that fault must

(Testimony of Simeon V. Kemper.)

be north and south or northerly and southerly. This material found there is considerably altered,—breccia,—it is ground up; it is material that you sometimes find in veins. I don't remember which way the lines run in shaft No. 1, if there are any well-defined lines; I presume there are some, but I am not prepared to say just which direction they run; that material is likewise mineralized, and iron is there, but I do not think there is any copper mineralization there; I did not have the material assayed; there is no evidence of any metalliferous minerals in there that I observed, other than iron. Shaft No. 2 is about in the same condition; I think the lines run somewhat northwesterly and southeasterly in shaft No. 1, what there are there; it is very badly broken up in shaft No. 2; I did not notice what direction it run there; it is just in the bedrock a few feet.

[1286] I saw no copper stain, if that is what you mean by mineralization, in shaft No. 9 or No. 3; there is iron through all that country out there; I attribute all that yellowish or reddish coloring going to the wash, or even in the bedrock, to iron stain. I presume you could find some copper stain in the material on the dump of No. 9; I did not examine for it. There is no evidence of copper stain on the dump of shafts 1 and 2; I examined that incrustation which Mr. Dean, I think it was,—one of your witnesses,—testified was a sulphide, and later changed it,—let me see what he did call it; he called it a copper ore. I examined that closely, and I am satisfied that any analysis,—that there is no copper in it; it was an iron stain. I think it was Mr. Dean; he first called it a

(Testimony of Simeon V. Kemper.)

sulphide, and he afterwards changed it, and I forget what he called it. There is evidence of copper mineralization in that material beyond the Mullins vein, and extending to the Hornet discovery shaft; there is some copper stain, if that is what you mean by mineralization; I did not sample it; I thought you would not take my testimony as to what it runs as seriously as you would disinterested witnesses; therefore I took no samples; I know the conditions that exist there in that particular locality which you mention; it is stained in spots; in places the country rock shows some staining.

Q. And even in the estimate that I give you of one and a half per cent copper value, of that entire mass of matter there is not any of this cuprite at all that we encounter, be it little or much?

By Judge BOURQUIN.—Was your question aimed at all those samples taken in both cross-cuts?

By General NOLAN.—Yes.

[1287] By Judge BOURQUIN.—We object on the ground that it assumes a degree that the evidence does not warrant.

The WITNESS.—In that section that you speak of, it is stained material, but I have not said that there is no cuprite in it; cuprite is not staining. You are assuming the staining independent of the cuprite will run one and a half per cent in that particular section; that is not my assumption; I do not know what it runs, but I know that is copper stained in there. I am not a geologist.

(Testimony of Simeon V. Kemper.)

Redirect Examination.

(By Judge BOURQUIN.)

The WITNESS.—In 1890 and 1891, when I was locating the Butte & Boston placer, I knew of the May Yohe placer on the north, and Jim Murray's placer on the west, and I believe that is called application 888, and the Park City placer on the south; the McQueen placer was there. I heard Mr. Mills' testimony with reference to his deepening shafts No. 1 and 2 in December, 1911. I saw Mr. Mason working on both of those shafts shortly before that, taking out dirt; he said he was cleaning them out; I was in them before Mr. Mills started to deepen them, which was after Mason had been working there, and at that time the shafts exposed clean bottoms; they had been cleaned out; I tried to determine whether they had been sunk deeper or not, but I could not. I gave that ground away on the compromise because I thought that the litigation would probably cost more than the ground given away was worth,—I cannot name the value of the ground in dollars; we did not consider it exceedingly valuable; we thought we were giving [1288] something of moderate value; I had had experience in litigation prior to that time.

Q. What had you found was the general result of litigation in the way of delays and a final settlement, in a general way?

By General NOLAN.—Object to that as immaterial. Anyway, the court will take judicial notice of the fact that all suits are costly and uncertain.

A. Well, I found that lawsuits were costly and

(Testimony of Simeon V. Kemper.)

tedious and uncertain.

The WITNESS.—The litigation had already been pending from 1891 to 1895, when the settlement had been made; of course, during all that time, there was more or less prospecting going on in that side of the district for leads; the bedrock was the most shallow in the portion of the Butte & Boston placer that we gave up, where the wash was most shallow; I don't know how deep the bedrock is. When I learned that Kift and Knoyle had made a location of the Hornet upon the Butte & Boston placer and had given a lease and bond to Mr. Mason, I considered that a cloud on my title, and I knew that we were subject to considerable annoyance on account of what might be,—subject to considerable annoyance on account of locations; in 1895, Mr. Mullins and other owners and myself, were endeavoring to avoid that particular feature in relation to the title by trying to find a lead that we could locate. There was considerable of re-locating or jumping here at that time, over placers. Mr. Merriman came to me and wanted to sell me an interest in some of the lode claims located on the Butte & Boston placer; I told him I did not want it; he had been to me a number of times before, and I told him I did not care to have anything to do with it; there were others in the office, though, that I referred [1289] him to. I said, "Go and see them." He took me at my word and I did not have any further dealings with Mr. Merriman in regard to that. However, this Mr. Bushnell, it seems, thought of buying it, and they brought the abstracts to me,

(Testimony of Simeon V. Kemper.)

brought the abstract down to date and brought it to me, and I looked it over and said, "Don't have anything to do with it; let it alone." I said "He hasn't got what he claims." I don't know how the company came to take it,—it was after I left,—I was on my way east somewhere when the company purchased it, and I learned of it sometime after I returned; I returned last May; the company had not purchased anything,—they put up the money for Mr. Bushnell; I learned here the other day that it was a twentieth, and the amount paid was less than a thousand dollars. It was hot weather when I first saw the ore at what may have been the Hornet dump,—it was after June, 1891. After returning from the east I went over the ground quite often; I was over the ground in June, and I did not see these shafts,—these openings that Mr. Mason has testified to, that he sunk in April or May; had they been there I would have seen them, because they were quite evident to any one that was there on the ground. There was no ore on that dump that I speak of in May, 1891 or I would have seen it there; there was some scattered ore all over that country; the float is covered with ore in spots and places, but I don't know of any ore on any dumps in that vicinity at that time.

Recross-examination.

(By General NOLAN.)

The WITNESS.—I spoke of some placers located in the neighborhood of this ground in controversy in 1891, but I don't know [1290] of them being worked as placers,—the Park City was worked,—

(Testimony of Simeon V. Kemper.)

well, that was before it was located; it extends up into a gulch; the work that I saw done there, I think it was perhaps in '78, was done near where Mr. Mason's house is now; the work done there was regular placer mining, but it did not last long; I don't think there was very much of it done; but that was a great many years before 1891. I don't know of any placer mining work done on the McQueen placer, nor where the Pittsmont is,—the bedrock was too deep, and there was no work done on the May Yohe except the work in order to get patent. I don't know just how many holes were on the ground there before the 11th of May, 1891,—there was the Pleasant View discovery; I don't know of any others; I saw that before the 11th of May, 1891; I don't know of any other except our own; there might have been some little old hole that had been dug years before and caved in, but I don't remember it. If there had been any new holes, I would have observed them; I don't know when I first discovered that hole; it may have been in the latter part of June, 1891; I paid a lumber bill there in July, and we have always made it a practice to pay our bills not later than the month succeeding when the material was obtained. I don't know how many holes were there in June, 1891, that were not there in the 11th of May, 1891. Assuming that it was in July that I saw those holes that Mr. Mason sunk, there would be three there in July,—if I counted them, I don't remember what the result was. I don't remember whether there was a windlass on the Hornet shaft at the time I went there; I saw a windlass

(Testimony of Simeon V. Kemper.)

on a shaft up there in subsequent years; I don't know what year it was, but I think it must have been when we were preparing the evidence for the adverse suit in 1895. I cannot tell how many holes were on the [1291] ground at the end of the year 1891; I would not say how many holes Mr. Mason sunk up there,—perhaps half a dozen, perhaps more; these holes that were sunk by Mr. Mason there, or through him, were sunk after May the 11th, 1891; my recollection is that I was out there right along after I returned from the east the latter part of April, and if those holes had been there in April and May, I would have seen them; I was a little surprised when I saw the holes,—I did not anticipate they were going on,—that kind of holes there. Before May, 1891, I knew the two notices were recorded,—the Pleasant View and the Point Pleasant, and that they covered this ground, and then, of course when I went on the ground, I would be concerned about any excavations that were made there. Getting back from the east on the 27th of April, 1891, and presenting my application for a patent on the 11th of May, 1891, if there was anybody on the ground doing work there between the 27th of April and the 11th of May, I think I would have known it; I was not there every day; I was not watching the ground, but I was there often enough so that I am satisfied I would have known it. This Hornet shaft, as it is now known to me, must have been sunk from the surface of the ground down after the 11th of May, 1891, and so as to those openings that you refer to now, on the northerly lead, as 1, 2 and 9. I made the examin-

(Testimony of Simeon V. Kemper.)

ation of all of these holes that I have spoken of already as a result of which I told you that some of them went to bedrock, at various times; my most recent examination was made a couple of weeks ago,—three weeks ago; I made an examination of them in 1891; I saw all of the holes that were there on the ground in 1891; my first examination was when I was walking over there in 1891, and I saw these fresh dumps and walked over there and [1292] looked at them; I cannot tell when that was,—it may possibly been in June,—I know it was an exceedingly hot day; if it had been there before I would have noticed it, and I don't know how to fix the time,—I don't fix it exactly, and I thought to myself, why, that man don't know what he is doing. Mr. Mason did not know what a lead was; he talked to me about ore over there and all of those things, and I saw that he was a novice in the business, all the time; he was renting a house from me at that time, I believe,—I am not sure about that,—but at various times I saw Mr. Mason and he,—whenever this was mentioned, he would talk about having ore over there, and I says “Why, that don't make any difference; you have got ore; that is all right.” These conversations were probably before this hot day, when my attention was called to this ore; I did not know he had sunk any holes over there at first. Mr. Mason told me about the shovel left in the bottom of the shaft being eaten up with rust; I saw an old shovel there and he said it came out of the bottom; I believe I saw two of them; he was present when we measured the

(Testimony of Simeon V. Kemper.)

shafts, or our witnesses measured the shafts, and I don't remember whether that conversation was at that particular interview or not; I recollect that shaft 1 was something like fourteen feet and 2 was twelve and a half feet; I know he called one of the shafts fifteen feet, and it was fourteen feet, and our man told him it was fourteen, and he seemed to accept the correction.

Redirect Examination.

(By Judge BOURQUIN.)

The WITNESS.—All of those shafts were sunk about three and a half feet square, and they were square shafts, and were sunk [1293] about three and a half feet square, and looked like they were sunk down about eight or ten feet, as was common in those days in representing placer claims; all over this country shafts were sunk eight or ten feet deep by one man, as the most economical way of doing the work. That Hornet shaft is quite a good deal larger now,—at the top it is caved in; it is hard to say,—it is ten or twelve feet across,—but down below it is five or six feet, along about the middle or bottom it is something else,—I don't know,—maybe five feet in the bottom; that shaft has been getting bigger and bigger every time an examination is made; it was made very much larger in 1901. Opposite the floor of the upper cross-cut I think it must be over six feet each way.

(Signed by the witness before examiner February 19, 1912.)

By Mr. SHELTON.—At this time the complainant will rest its case in rebuttal.

[1294] Defendants' Case in Surrebuttal.
[Testimony of Samuel Barker, Jr., for Defendants
(Recalled in Surrebuttal).]

SAMUEL BARKER, Jr., a witness heretofore duly called and sworn on behalf of the defendants, being recalled, testified as follows:

Direct Examination.

(By General NOLAN.)

Q. Mr. Barker, assuming that where the ground in controversy is, through processes of erosion, there has been a wearing away or a destruction of say four or five hundred feet of granite, covering the period of time that geologists would consider necessary to accomplish that, and in this process of erosion, or that is gradually accomplished, there is a loosening or a release of chalcopyrite that may be in the granite, so that, with the chemical changes occurring, or possible of occurrence, this chalcopyrite resolves itself into sulphate of copper, and, having in mind the soluble properties of sulphate of copper, which is carried along and coming into contact with the silica which you consider in the aplite that we are advised abounds there, would you say that it would be possible for that sulphate of copper to become silicate of copper?

By Mr. SHELTON.—Object, as not proper surrebuttal testimony.

A. I should say it would not become silicate of copper, which is chrysocolla, that is, with the ordinary process of erosion which would occur at the surface, and, naturally, would mean cold solutions.

(Testimony of Samuel Barker, Jr.)

Q. And when you make the answer that you do, have you in mind likewise the slow process necessarily going on in this [1295] erosion that removes this five hundred feet of superincumbent material?

Mr. SHELTON.—Same objection, same ground.

A. Yes, sir, I have in mind the geologic eras that would go by, in which time the amount of erosion you mention would be accomplished.

Q. So that, having in mind, then, the conditions submitted in the question put to you, and having in mind this chrysocolla which we find in the material in the ground in controversy, what is your judgment as to whether that chrysocolla is there as the result of ascending solutions or of descending solutions, brought into existence through erosion, as I have stated?

Mr. SHELTON.—Same objection, same ground.

A. I would say the chrysocolla, for the most part, has been brought into being there by ascending solutions. There has been a redeposition, of course, because of erosion by descending waters.

The WITNESS.—Taking Complainant's Exhibit 35 as fairly typical of the material encountered in the cross-cut from the Mullins vein to the Hornet shaft, this green coloring that exists here is chrysocolla; it is copper; and the rock originally, before affected by solutions depositing the copper was granite; there is evidence of change or alteration in that rock; it is very noticeable indeed. I should say that the copper content of any of the three pieces of rock shown me

(Testimony of Samuel Barker, Jr.)

from Exhibit 35 by plaintiff, would run quite high in copper; that it is untrue that the amount of copper, or the copper contents of those rocks is infinitesimally small. The facts that go to prove what I am saying now is that the material has been dry [1296] for a great number of years. If that were below water level the green coloring would probably be ten times as great as it is now. And I took, personally, samples in this very cross-cut from which these rocks came from to see what they would run, because the coloring was so small in those rocks by the copper in them that I told those that were with me that I did not think it would run anything, and I found, much to my surprise, that they were good copper rocks, quite a good deal of copper in them, so that in this cut particularly, or in this vicinity, you cannot, by looking at the rocks, tell what the copper contents is. From a casual looking over of the sample one might say that the amount of copper in either of the rocks would be small as to per cent, but I know that an assay would be surprising to the person who brought the sample here, in so far that it would go very much higher than he ever dreamed of; and I know that from experience I have had from assays made of the material in this very cross-cut which these samples came from.

Cross-examination.

(By Mr. SHELTON.)

The WITNESS.—All of the chrysocolla on the ground in controversy in this case has been caused originally by ascending solutions; there has been a

(Testimony of Samuel Barker, Jr.)

redeposition by descending solutions thereafter, because of erosion, the materials breaking down and the mineral contents being redeposited. I think originally the copper was deposited by the ascending solutions in the form of sulphides and some chalcopyrite; the chalcopyrite has been oxidized, and that material was,—there is probably some copper sulphate occasioned by that breaking down, and the [1297] copper sulphate became dissolved in water; it might have been carried down deeper, where it again became sulphide; I said a part of the chrysocolla came from ascending solutions; as the material came up from below it did come up through fissures and deposited some in the veins, and some, I should say, outside and near to those veins; the hot solutions coming in contact with the silica, or the aplite and the granite, gave us our copper silicate; and it was caused in part by descending solutions. I told you a few minutes ago that those descending solutions were taken down through the material, deep-seated again, and probably changed to sulphides. The copper silicate itself would be,—I think would be washed away, carried away. I do not think any part of the chrysocolla was formed by descending solutions,—not by way of surface erosion; I cannot conceive of chrysocolla being formed where there has been erosion and the copper sulphate cold coming in contact with the silica and aplite in the granite and changing into chrysocolla; I cannot conceive of that at all. I have not observed in the vicinity of the ground in controversy in this case the green stain very generally throughout

(Testimony of Samuel Barker, Jr.)

the granite; on the contrary, I find it only close to the fissures, which would allow the ascent of waters mineralized. I remember the cut that was made by the street railway track when the line was built near or across the ground in controversy, but I did not notice that along that cut, that for the whole distance there was more or less green stain; I have not observed it any place except in the vicinity of veins, and below the wash. You are talking now of the street railway cut,—of wash material entirely, nothing in place. You can find, of course, rounded pieces of material that are green in that wash, that have come down from [1298] the east of the street railway cut, but such is not in place. Ascending solutions produced silicate of copper because they certainly were terribly hot; no man knows what those solutions were when they came up. The ascending solutions made sulphides; your descending solutions would naturally be oxidized at the surface. I was not here when the sulphides were formed, but I take it, from Mr. Winchell's and other experts' opinions, that, yes, there were several sulphides formed,—chalcopyrite,—in his article only a couple of weeks ago he admits that chalcopyrite or copper glance was a primary mineral. That is one of the sulphides; there is a difference between the sulphide of copper in the granite and the sulphide that is produced by the ascending solutions. The copper in the granite was supposed to have been chalcopyrite; in this case chalcopyrite was formed by the ascending solutions, because, certainly, that chalcopyrite never got into the

(Testimony of Samuel Barker, Jr.)

granite from descending solutions; it would seem to have been, from the testimony on all sides,—to have been injected into the granite practically at the time when it became solidified. The chalcopyrite in the granite is the same mineral as the chalcopyrite in the veins; they are both sulphides of copper. The silicate, or the silica of the aplite and the granite certainly would not be broken down by cold solutions, and that the ascending solutions would be the agencies which would bring about the breaking down of the granite itself, and liberating silicic acid, or whatever it might have been, and from that you could get your chrysocolla; in my judgment it is necessary that there should be great heat, in order that the result of the mixture of the substances mentioned would produce chrysocolla; the gases, which are sometimes called the liquids of the ascending solutions also had some [1299] effect in changing the silica of the granite and aplite; I think chrysocolla is insoluble in water at ordinary temperature. It would be leached out. The chrysocolla in the Mullins fissure in my judgment, was formed by ascending solutions. Chrysocolla was formed, and is found to-day in the copper areas of what you call the Butte Hill. On what is called the Anaconda Hill there has been a great oxidation, so that the entire material has been changed. The granite itself has been,—like as if it had been in a furnace, it is so terribly oxidized, practically all the original characteristics of the granite have been changed; that might have come about because of the several immense fissures that you find

(Testimony of Samuel Barker, Jr.)

on the Anaconda Hill. The fissures on the ground in controversy are minute indeed, compared with the fissures on what you term the Anaconda Hill. Oxidation is the result of the action of the air,—that is one of the causes; there might have been other features that occasioned the oxidation of the Anaconda Hill,—and there must have been, because we do not find that condition existing either to the east or west of the area that I talked of; for instance, right here on Main Street, we do not find the same oxidation at all; we find chrysocolla nevertheless, alongside of the veins, and to the east we find chrysocolla in the veins. But the Gagnon fissure, as far as I know, which would be west of the Anaconda Hill, is very much smaller than the fissure we find on the Anaconda Hill. Besides, we have quartz porphyry on the Anaconda Hill. That might have had some effect on the granite, occasioning some of the oxidation that is found there. Wherever I have seen quartz porphyry there has been a great deal of oxidation at the surface. Quartz porphyry is not generally distributed throughout the Butte Hill. Wherever I have noticed [1300] the quartz porphyry I have noticed that oxidation in the same vicinity. For instance, you take the Modoc Hill. That shows it. You take the Anaconda Hill up around the Mountain View, where I have seen a great deal of quartz porphyry; that is characteristic of that section. It would seem that oxidation has had the same opportunity to take place on the ground in controversy in this case as on the Butte Hill, although the Anaconda Hill might have been exposed long ages

(Testimony of Samuel Barker, Jr.)

before the portion of the Butte District which is in controversy here; there is no reason to suppose that it was that I know of at present. In the Mullins fissure there is chrysocolla,—practically all of it is filled with chrysocolla. I have not seen any place on the Butte Hill of a similar deposit of chrysocolla in any fissure; I do not think that anyone else that is capable of testifying to-day could know that condition, either, because those conditions have been destroyed, or were destroyed a great number of years ago; I did not know the veins before there was any work on them. I was underground in the Anaconda in 1885, but they were in sulphides then and had been for a long while; they never worked them on the surface, and whatever deposit was in the sulphides is still there, but now you take the Gagnon vein, that was worked to the surface, and Parrot was worked to the surface, and we find to-day the chrysocolla right alongside of those veins now, but I don't know what they were at the surface. Those were exceptional cases,—the Gagnon and the other veins I mentioned, that were worked at the surface. I never saw chrysocolla in them, but I say the chrysocolla is here to-day alongside of those veins,—might have been some in the veins for all I know; I brought up some samples from alongside those veins; I think I said that the chrysocolla came [1301] from ascending solutions. The copper deposited in the vein and being leached out, and being carried into the adjacent country, would not form chrysocolla from erosion and oxidation. I said that heat was one of the things that I would expect, or

(Testimony of Samuel Barker, Jr.)

one of the features I would expect to find accompanying ascending solutions. I have never conducted any experiment, using silica disintegrated and sulphate of copper in solution, at ordinary temperature, in order to determine whether silicate of copper would result. Aplite breaks up into small particles by the process of erosion, the same as the granite does; therefore that gets back to the proposition that you must have an absolutely cold condition at the surface of the ground to bring about a deposit of copper sulphate, and I do not think it can be accomplished through such agencies; and along with the heat were the gases, which are sometimes called vapors. They were also the agencies which brought about the breaking down of the silica; I certainly think the vapors would attack the silica, and that they would attack it to a greater extent than though the copper was contained in a solution of water, because you have your interlocking crystals that Mr. Winchell tells about. When the ascending waters are brought up from deep-seated places, certainly the silica that was near the surface was changed, from his own testimony. The ascending waters carry silica in solution,—I think there is some silica,—of course, I get that from the theory of geology. Granite contains feldspar; the feldspar is altered and becomes clay, *which* kaolin; some clays, particularly in the Butte veins, are found at great depth; I have found pieces of kaolin that would weigh ten pounds in the Mountain Con on the eight hundred foot level. [1302] It occurs at the surface as well as at depth, because all of our

(Testimony of Samuel Barker, Jr.)

porcelain is made from clay that is mined at the surface. Kaolinization may be due to descending waters or ascending waters. I do not know that the kaolinization of the feldspar renders the silica of the feldspar active, so that when it is brought in contact with the copper sulphate in solution, the result of the chemical reaction is silicate of copper; the theory you are proceeding on now is, because there has been a kaolinization of the granite out here, and a replacement of a portion of the granite by copper, that it comes from the surface,—descending solutions,—but kaolinization has taken place, as I should say, in the veins of the Butte camp, not from descending waters at all; but from ascending waters, because I find the kaolinization at such a great depth, into the sulphide zone, that certainly descending solutions would not have been responsible for the kaolinization of the feldspar. The granite away from the veins in the Butte camp is absolutely solid, as far as I have seen; I have not seen any kaolinization on the surface; I have seen the granite boulders in the immense district north of here, with its great area of rounded boulders, showing a great deal of erosion. Certainly it does not show to me any kaolinization of the feldspar; I would not say that there is not any kaolinization except in the vicinity of the veins, because there might be other agencies which would bring about kaolinization, excepting where you have vein fissures. The clay beds are the result of kaolinization. I did not say that clay, wherever it occurs, is the result of kaolinization of the feldspar in the granite, because

(Testimony of Samuel Barker, Jr.)

you find clay beds absolutely remote from granite areas, thousands of miles, in some instances; for instance, [1303] the greatest clay-beds in England are not anywheres near any granite area,—and the purest clay-beds, too, in the world. The clay-beds in the granite areas are due to the kaolinization of the feldspar in the granite,—some of it. I think I said a few minutes ago that by both agencies there could be a change; I said I found it deep in the Butte camp, which must have come through ascending solutions; and you can find it close to the surface, which probably was occasioned by descending solutions, although in this chrysocolla which we have out in the district we are speaking of, I think came about from ascending solutions in the first place. If the granite or the feldspar of the granite in the district we have under discussion now should be kaolinized, there is absolutely no reason why this coloring matter which is copper, as you call it, should not have spread over the entire mass. Why should there be any lines of demarcation there at all, when we have the same conditions for breaking down and kaolinizing the same piece of granite, and one foot from it you do not have it at all? That is absurd. I don't know whether the result of this is to produce silicic acid; I see no reason why, because the feldspar is not a silicate at all. The silicic acid would certainly come from the silica of the rocks. There might be a little silica in the feldspar of the granite; I don't know the chemical composition. Have you got a geologic folio here?

(Testimony of Samuel Barker, Jr.)

By the EXAMINER.—No, none was introduced in this case.

The WITNESS.—If it does contain silica, then silicic acid might result from the kaolinization of the feldspar, and if this silicic acid and sulphate of copper are in contact, you might have silicate of copper as the result of the reaction,—now let's get right back to the ground in controversy. Now, [1304] you have the opportunity for this same breaking down in every particle of granite over that whole area, without question and yet you only find the copper extending out for a certain distance from what were originally the main fissures. If, with the indiscriminate breaking down which you say takes place out there, and with the copper sulphate caused by erosion, and the kaolinization of the feldspars in your granite, certainly the whole area should have been kaolinized with chrysocolla. And the facts do not bear that proposition out at all. There is absolutely no reason, under the conditions you are laying down for me here, why the whole area should not have been colored with copper, and it is not, and that could not possibly result from the fact that there was more chalcopyrite in one portion of the granite than there was in an adjoining portion; that is a proposition that nobody can settle. Chrysocolla is not evenly distributed through the granite, but it is not so scattered in this one spot so as to bring about the conditions that you are trying to bring.

Q. If the chalcopyrite becomes oxidized and changed to sulphate of copper and is dissolved by the

(Testimony of Samuel Barker, Jr.)

descending waters, it will be carried along channels, will it not, that is, through the breaks in the granite to a greater extent than it will permeate the mass of the granite by capillary attraction.

By General NOLAN.—We will object to that for the reason that the question is based upon confessedly wrong assumptions. The witness is asked about the deposition of this chrysocolla through capillary attraction when, as a matter of fact, the question assumes that the staining is done by descending waters. Consequently capillary attraction could have no application at all.

By Mr. SHELTON.—I think the witness will be able to answer [1305] without argument of counsel.

By General NOLAN.—If the capillary attraction cuts any figure in this problem now under discussion, it is because of ascending rather than descending waters, and waters ascending beyond their levels.

A. If the fissures or the cracks in the granite are open, why, certainly, it would afford the means for a more ready circulation of waters than the solid granite mass itself.

The WITNESS.—The water would not permeate the solid mass of the granite to the extent, certainly, that,—if the fissures were opened, why, that would be the ready means,—there would be no use,—it could not spread out at all then. It would not spread out. It would penetrate the mass to some extent, but not to the same extent that it would be carried through the open channels. You will not find the copper or

(Testimony of Samuel Barker, Jr.)

any other mineral permeating the granite mass when it has been occasioned by descending waters, because the granite mass originally is so,—it is not porous. It is practically a solid block,—that, unless you had the agencies that come through ascending solutions, the copper or any other mineralization, would not be forced into what you call porous granite, because the granite is not porous; it is practically a solid monolith; if a chunk of granite is immersed in a vessel of water it absorbs the water, like a piece of steel would,—a piece of steel would take on water if placed in water; I venture to say, though, that a piece of granite such as existed there originally and not like the material that you are showing me now in this sample, would not be increased in weight but a very infinitesimal part, because of its immersion in water. When the copper is in solution in water, the copper is carried wherever the water [1306] goes, and if the chunk of granite absorbs moisture, it will also absorb the copper with it, and there would be a greater deposit of copper in cracks in the granite, and open fissures of that kind, than in the solid granite. I do not think I would expect to find a greater deposit of copper in the vicinity of the cracks and fault fissures than in other places, which would account for the uneven distribution of the copper in the granite, because you are assuming now the character of material as the granite that you have shown me, being a portion of exhibit 35. I say that the granite originally out there must have been, and was the gray granite mass, such as you find removed from the

(Testimony of Samuel Barker, Jr.)

veins here in the Butte camp, when pierced by long cross-cuts, that it was unaltered and a solid mass. At the present time, the surface of the granite there is more or less broken up, and there are numerous cracks and fissures throughout the surface, and there are portions of the granite there where the disintegration and breaking up of the surface and the occurrence of cracks is greater than in other places, and I would expect to find the greater deposit of copper in those places where there is greater disintegration of the granite and more cracks, assuming that it is due to ascending solutions; that would be the case, and yet the ground itself disproves that statement. For instance, in the Rabbit tunnel,—tunnel No. 31,—you have at the beginning of the north cross-cut, so called, running off from the tunnel, a fault, or a vein, whatever you want to call it there,—I don't know what the witnesses have called it,—and yet you do not find any of the green staining there at all, absolutely none, and yet that certainly, being alongside of the vein which is found in the vicinity,—which is found in the north cross-cut,—which have [1307] afforded a ready means for those circulating copper solutions, and yet you do not find any green staining there. I find it in some of the other fissures in that tunnel; right in that there tunnel, for instance, east of the second fault plane, you do not find any green staining at all, and yet within the limits of the two fault planes, it is very green indeed. I do not find a green staining of the granite there which is not connected with any crack. In the

(Testimony of Samuel Barker, Jr.)

cross-cut north from tunnel 31 some distance, I found a green stain just before you get to the vein,—I should say not more than two or three feet from the vein; now, my other testimony went into that thoroughly, because that was one point that I paid particular attention to when I was on the ground. The staining is so terribly slight there that it can hardly be called a green staining, and yet I admit I found specks,—it is chrysocolla. I found this green staining in the north and south faults; in tunnel 31 I found it. The Continental fault certainly has been mined and shipped, and it was commercial copper ore; there are places in it where there is not any chrysocolla at all; I have seen the Continental fault as far north as the Butte & Bacon ground, and I did not see any chrysocolla there in that fault. I do not recall now any places near and in the vicinity of the ground in controversy where there are places with no green staining. In the same vein, within ten feet of each other,—two points within ten feet of each other,—you would find a more ready circulation of waters in the one point than you would in the other,—and if the deposit is due to descending waters, it might be accounted for on account of there being a freer circulation of waters in one place than in the other; you have in your massive granite fissure out there on the Butte [1308] & Boston placer,—why, certainly, the granite itself that is now mineralized, was the same, as far as the ready passage of circulating mineralized waters was concerned, in one place as in another, and yet you do not find the whole gran-

(Testimony of Samuel Barker, Jr.)

ite mass mineralized. I am speaking of what I find to-day. There is the Mullins vein fissure, so called, it has higher mineralization now than you will find on either side of it, and you will find places in the Mullins vein itself that are very much higher in copper contents than a point five or six feet away from it in the very same fissure. Those are things that geologists or no one else knows how to account for. Why we should have chutes of ore in a vein is something that is peculiar, why they should dip one way or another, and why they should be higher in values at one spot than in another, when, to say to-day the same ready means is afforded to circulating waters, is beyond us. If the formation of chrysocolla being due to ascending waters, I would not expect to find it at depth; below your permanent water level, why, there has been certain acids or alkalines,—whatever they might be,—that have changed the material that was not affected by that permanent water level. The material that is above the permanent water level, we find in practically every vein, the oxidized zone and the sulphide zone, and the changes came about because of what is known as the permanent water level, that is, there are, as I said, acids and alkalis contained in those waters which have changed the rock itself, or changed the mineral in the rocks or veins, and they are termed sulphides. I would not expect to find it below the permanent water level; I would expect to find sulphides, and the reason I would not expect to find it below the permanent water level is due to the presence of acids and alkalis below

(Testimony of Samuel Barker, Jr.)

[1309] the permanent water level because they are not found above it; I know these acids must have been there because the fact that I see in the ground proves it to me; I don't know what the waters contained; I do not think the waters to-day are the same that were there originally. It does not seem from the conditions we have here that the chrysocolla that is to be found to-day in the Mullins fissure below the permanent water level is as it existed probably when the fissure was formed and the original mineralization took place; the immense Silver Bow Basin below here, which has been filled up several hundred feet, this rock out here stood probably a thousand feet above that and probably more than that, because it is claimed that six hundred feet of erosion has taken place. And we find to-day that the present surface of the ground of the Butte & Boston placer must be practically a thousand feet above the original solid ground of the Silver Bow Basin. Now, I should think from that that this material has always been above the permanent water level. I am more or less familiar with the Bullwhacker. I do not know where the permanent water level depth is there; I think that if you would run a tape-line down the shaft now you would find it, but I don't know what it is. If I were to sink in the rock out there where there is an occurrence of chrysocolla, and found that it disappeared as I went down, and before I reached the permanent water level, it might be the case that it was due to descending solutions rather than to ascending solutions, and yet no one knows what the

(Testimony of Samuel Barker, Jr.)

conditions were existing in that ground that otherwise might make a change too. As I remember it, in the Bullwhacker, you find the chrysocolla extending right down to what might be termed the permanent water level; at that place you find the material very runny, [1310] indeed. The granite, or what was the chrysocolla above, is very soft material now. That water level is raising up and down all the time. It is not stationary. And that has probably occasioned some changes in the vein matter itself. For instance, in any vein where you have rich, oxidized material near the surface and extending down for some little distance between that rich,—the bottom of the rich portion in the oxidized zone and what we call the permanent water level, you find a zone that is practically leached out, no minerals there at all, and yet, when you get down below the permanent water level you find the rich mineralization again, but it is in the form of a sulphide. There has been some agency there that has changed the chrysocolla, probably to a sulphide, and has taken it down to a greater depth, taken the copper down in the form of a sulphide to a greater depth below the permanent water level. This is the history of all the Butte mines, any way, as far as their oxidized and sulphide zones are concerned. And it is true of practically every other mine where you have waters. Of course, that does not occur down in Arizona, where we have the oxides of copper and some of the other copper minerals,—the carbonates. Complainant's Exhibit 35 has undergone some alteration, and it has been replaced by cop-

(Testimony of Samuel Barker, Jr.)

per; there has been a mineralization by replacement. If I were to assume that that was very much greener when it was brought in here, and in drying it has become much lighter, that would not mean any lessening of the copper content at all. The original color of the chrysocolla would be brought back, that is all, to its former coloring. The dark spots in this granite (referring to Complainant's Exhibit 35), I think originally was the mica of the granite; some of the mica remains practically unchanged, [1311] and some of it is altered and changed. It is not the mica of the granite as it is there now, because anyone inspecting the rock would see that there are some of the mica plates there visible; they shine. By far the greater portion of the black material has been altered, and if that was the original mica, why, at least nine-tenths of the mica of that granite has been altered or partially altered; the quantity of mica in granite is a varying thing; I think it would be impossible to get two pieces of granite and find absolutely the same percentage of mica; if this had been mineralized by replacement, I do not think the mica would have entirely disappeared. I have seen in places, where there has been a mineralization by replacement, where the mica shows as in this sample 35; I can show you what you call absolutely fresh granite, and on shipping it it will return you a hundred dollars a ton. It is right over here on the Silver King. The miners threw it on the dump as waste, and afterwards hundreds and hundreds of tons were shipped to the smelter and returned one

(Testimony of Samuel Barker, Jr.)

hundred dollars a ton, and yet you cannot find any replacement in it, or you cannot by the eye. It is not a fact that the only alteration that has taken place in this granite has been due to the action of the air; the alteration in these rocks has been the alteration of the original feldspar and the original micas in there, and a replacement of the granite by copper,—or a replacement in the granite, I should say. Replacement means that some element is taken out and another added. In this granite, from the looks of the rock, without a chemical analysis, I should say the major portion of the replacement was in the feldspars of the granite, and a slight portion of the replacement came about by the change of the micas, of the alteration and replacement [1312] of the micas. I don't know what element was taken from the feldspar; I would not feel qualified to testify as to what element or what mineral had been replaced by the copper; what I know is the fact that I see before me in the rock that there has been a replacement, from a visual examination; I find in the rock that the feldspar have been somewhat altered, that the copper exists in the feldspar and slightly in the micas, and that it is not a coating, but that it is through the entire feldspar of the material, and partially in the mica. There is a slight change of color; this rock is a little greener than it was originally, and the green coloring extends throughout the mass of the rock, but it does not extend as a coating; it is through the mass,

(Testimony of William R. Hocking.)

and the green coloring is principally in the feldspar, of the rock.

(Signed by the witness before the Examiner, April 9, 1912.)

**[Testimony of William R. Hocking, for Defendants
(Recalled in Surrebuttal).]**

[1313] WILLIAM R. HOCKING, heretofore duly called and sworn as a witness on behalf of the defendants, being recalled, testified as follows:

Direct Examination.

(By General NOLAN.)

The WITNESS.—I am the same Mr. Hocking who testified in this case before as an assayer; I recently received some samples from Mr. Stevens for the purpose of having them assayed, and I did the assaying of the samples that were turned over to me by him myself, and furnished him a certificate showing the values of the samples that were assayed by me.

By General NOLAN.—Will you mark that for identification? (Handing paper to examiner.)

By the EXAMINER.—I will mark that Defendants' Exhibit No. 114.

The WITNESS.—The certificate marked Defendants' Exhibit No. 114 was issued by me of the assays brought in by Mr. Stevens, and the returns correctly represent the values of the samples turned over to me by Mr. Stevens.

By Mr. SHELTON.—Object to that. There is no way in which it appears that it is proper surrebuttal testimony.

Q. And I notice that you have number marks.

(Testimony of William R. Hocking.)

Did you give those numbers to the samples, or did the samples themselves have those numbers?

Mr. SHELTON.—Same objection.

A. The numbers were marked just the same as they are here when they were brought into the office.

(Signed by the witness before Examiner April 9, 1912.)

**[Testimony of Louis Mason, for Defendants
(Recalled in Surrebuttal).]**

[1314] LOUIS MASON, heretofore called and sworn as a witness on behalf of the defendants, being recalled, testified as follows:

Direct Examination.

(By General NOLAN.)

The WITNESS.—I have done additional work since the adjournment, upon the ground in controversy, in shaft 21 and in the Olivia discovery; I also accompanied Mr. Stevens when he obtained some samples for the purpose of having them assayed. Shaft No. 21 is the northerly shaft,—the deep shaft, so called, and it is about a hundred and ten or twelve feet deep.

Q. And what was the character of the work that you did in that shaft?

By Judge BOURQUIN.—Object to this character of testimony for the reason that it does not come within the rule of what is surrebuttal testimony, and hence incompetent.

A. I sunk the principal part of the shaft to a further depth of about eighteen inches. Then I drove a cross-cut south about two feet in height and a half

(Testimony of Louis Mason.)

in width, and about five and a half feet in height and to a distance of about twelve feet south from the south end of the shaft. And in the driving of this cross-cut the stratas or seams, sometimes called, ran in an easterly and westerly direction and dipped north, and at a distance, in the bottom level, going south, the cross-cut of about eight feet,—no, about seven feet from the shaft, I cut across a heavy strata or wall running east and west and dipping north. I drove across that at the top, and left a level plane, as it raised up, toward the south, and I cut [1315] each way in the bank a distance of about a foot, showing this wall as it runs in its course east and west, and as it dips to the north. I also channeled out in the sides of the cross-cut on other planes or stratas to show their dip and their strike, so that anyone could readily see that the strike of all of those stratas were easterly and westerly and their dip to the north.

Q. Well, now, was that all the work that you did in this shaft No. 21?

By Mr. SHELTON.—Same objection, same ground.

A. I also cut out channels in the shaft for a distance of six or eight inches and one about sixteen inches along the west side of this shaft, and on the east side of the shaft, to show that those planes or stratas running east and west crossed this shaft and that they dipped north. And I also followed the line of the strata down on the west side and across the north end. I cut out there two places a distance of

(Testimony of Louis Mason.)

probably ten inches back along the wall, across the shaft. This was dipping north, so that any person could readily see the strike of those stratas and the dip of them.

The WITNESS.—In running this cross-cut to the south until I encountered this wall, I was in lead matter.

Q. And could you tell whether this was the wall of the lead that you encountered in this cross-cut?

By Judge BOURQUIN.—The like objection as that heretofore made, and also that it is leading.

A. It is a true slip or wall within the vein, apparently. There is vein matter still south of this wall.

Q. And in the work that you did there, what do you say as to whether or not the disclosures made show that this was simply [1316] a fault running north and south or a lead running east and west?

By Judge BOURQUIN.—Like objection.

A. Every indication is that it is an east and west vein. I should say that you could take a man that has never visited a mine or a vein, and he could say readily that, by an examination of the cross-cut and the shaft, the way those stratas cross it, that the stratas indicated an east and west vein with a north dip.

The WITNESS.—Aside from this work in the deep shaft, I did other work on that northerly lead since the adjournment took place, in the Olivia discovery, which is located on the north vein and near the north side line of what is known as the Butte & Boston

(Testimony of Louis Mason.)

placer, or the Rabbit and Olivia quartz lode mining claims; it is situated between shafts No. 1 and 2, and a little north, as shown on the map, Defendants' Exhibit 1; the south side of this shaft, the Olivia, probably is in line with the north side of shaft 1 and 2, and it is so marked on the map.

Q. Now, what was the character of the work done there?

By Judge BOURQUIN.—Objected to, like the objection heretofore, that it is not rebuttal and hence incompetent.

A. I cleaned the debris out of the bottom,—out of the Olivia discovery, which had filled in the past years, and drove a drift from the bottom of the Olivia discovery west, and connected to the north side or corner of shaft No. 1.

The WITNESS.—The drift was approximately ten feet in length.

By Judge BOURQUIN.—Let the record show that the objection goes to all this line of testimony.

The WITNESS.—The drift was drove in country rock along the hanging-wall of the north vein, leaving the vein stand on the [1317] south side of the drift as it run west, and clear granite on the north side as you go west, and there is a lead discovered in that drift the entire distance, and it is continuous throughout the entire distance and to the west side of the shaft No. 1, where it is last seen. The hanging-wall of that lead was disclosed in the drift. I was with Mr. Stevens all the time in taking those samples, with the exception of three samples which

(Testimony of Louis Mason.)

he took while I went for more candles.

Cross-examination.

(By Judge BOURQUIN.)

The WITNESS.—I think the Olivia shaft was sunk in 1900; I started my drift in the Olivia discovery about eighteen inches or two feet north of the south end of the discovery shaft, and drove west from the west side of the shaft; I started in the country rock north of the vein; on the southern side of the drift is the vein; north in the Olivia discovery shaft it is granite, decomposed some; you will find little stratas, maybe an inch thick, of quartz in places in that granite, as you usually do in granite. I drove this drift in the country rock; I should say it is five feet high; it is all in country rock, and the back is in granite; it shows just the slight touch of the wash, just at the back of No. 1. My drift came a little below the timbers in the bottom of shaft No. 1; I should judge the drift was about seven feet from the bottom of shaft No. 1, and all the way along I exposed the hanging-wall, and I picked into the hanging-wall and took samples out of it, about three or four inches, so as to get samples; I did not pick through the vein to see how far south it went; the material on the [1318] south side of the wall was vein matter, iron and quartz; it resembled the material in shaft No. 1; it produced the same iron that I produced here before in evidence; I would say it was the same practically as the exhibits we brought here from shaft No. 1, and really a better grade than the exhibits we brought before. My drift cut the north-

(Testimony of Louis Mason.)

east corner of shaft No. 1; I made the drift about twenty inches or two feet wide, and the corner of the shaft came pretty close to the center of the drift; the most of it I think was on the north side of the corner. I left the hanging-wall standing as the southerly side of the drift all the way along there, picked into it, but did not penetrate it more than enough to take a sample or so. Some of the granite on the north side of that hanging-wall was iron stained, but not very much; it is decomposed to some extent; it is not a hard, firm class of granite; it is like the granite which is usually found near the surface; there is small planes in it, that you will find in all granite, and there is a little more coloring, probably, in those seams than there is between them; we did not use drills in blasting,—we picked it all the way.

I did no cross-cutting north in shaft No. 21. The entire distance of the cross-cut south was in bedrock, with the exception of the back. I should judge there was something like four feet of the cross-cut in bedrock,—that is, from the floor of the cross-cut up; I inclined the cross-cut as I went south, and I crossed various planes running east and west in the driving of this cross-cut, heavily iron stained and smooth, dipping to the north, and about eight feet out, I should judge,—seven or eight feet, I came in contact with a larger plane than the others,—the seam was thicker, understand, and well defined, [1319] running northeast and west and dipping north. I cut some beyond it, and it is still vein mat-

(Testimony of Louis Mason.)

ter beyond that wall. It is quartz heavily iron stained, and you find some of this black iron, that some prospectors call hematite iron, in the rocks. The material I cut through in my cross-cut is of a character more inviting than that in the shaft,—it shows stronger in mineral, in iron. I did not bring in any as an exhibit; I brought some to the house with me, but I forgot it as I came away. About seven feet from the shaft in my southerly cross-cut I crossed a heavier seam or wall, and as far as you can see it it extends clear across the cross-cut and pass out on each side. A wall usually is expected to continue farther and more regular than an ordinary seam; a wall and seam are not the same; a wall might extend farther than a seam; that is the only difference I know. This wall was about half an inch thick, and the matter composing it is iron material; on the north side of it was vein matter and quartz and porphyry and some talc,—it is there in the shape of a ledge, as you usually find in ledges. The cross-cut is about two feet and a half wide; there is more or less quartz in the shaft, in this vein matter, and also in the cross-cut going from the shaft to this wall; you find the quartz continuous all through this,—quartz within the ledge; it is solid quartz; it is quartz in various pieces within the vein matter, as you usually find in the veins at the surface, and you will find pieces of porphyry within the vein matter, in the shaft and in the cross-cut. I passed through the seam or wall that I found about seven feet from the shaft, and on the south side of that found vein

(Testimony of Louis Mason.)

matter, and again this broken-up quartz and porphyry and vein matter mixed up; I took a piece of quartz, a highly stained iron material that Mr. Kemper picked up [1320] out of the bottom of this cross-cut south of this wall. At present I would not call that wall or seam seven feet from the shaft there either the hanging-wall or the footwall of my vein. Where this wall south of the shaft appears heavy iron stained, I channeled out, or cut out, on the east side of the cross-cut a distance of about a foot, and about three and a half feet, probably, up on the incline or the raise of the wall. I cut out on the west side of the cross-cut also. Then farther toward the shaft I cut out a channel in the east side of the cross-cut, again showing one of those seams or planes, as it had its course easterly and its dip,—to show its dip northerly,—and in the shaft I think I channeled out five or six places there to a depth from three inches to twelve,—fifteen inches,—showing the strike of those seams and the dip of them, both on the west side of the shaft and on the east side of the shaft, and upon the north side, showing their dip on northerly; I cut into the sides of the shaft and the cross-cut along the strike of these seams or walls, as I term them, following them, so as to show readily their strike and dip. I sunk the shaft about eighteen inches deeper, I should judge. I think it was about five feet in bedrock then; in going south in my workings, I had the back in the wash all the way. I judged this channeling was necessary to show the seams or walls, because they had various men exam-

(Testimony of Louis Mason.)

ine that shaft. These lines were very plain and easily seen in the west side of the shaft, in the north end and in the east side. They gave testimony that the vein was a north and south vein, and I cut those channels out of the sides of the shaft and the end of the shaft to show the strike of those seams or planes, and to show the dip of them. They already appeared in the sides of the cross-cut, [1321] and in the sides of the shaft, but it seemed that the geologists did not recognize them as being northeast and west strike and a north dip; as far as I picked in, every place those planes continued on either east or west, according to which side of the shaft I was on. Before they were cut, you could see the brought lines running down the side of the shaft, and by channeling down you could see the level plane as far as I channeled. I dug the rock off of the upper side of some of them, and some of them I dug it off the under side, leaving the plane smooth, so it could be easily seen; I used a pick. I saw no seams or planes running northerly and southerly in that shaft, with the exception of the one Mr. Shelton examined with the pick in the northeast corner. There is a boulder of granite, apparently lying in the corner of the shaft. The shaft cuts a "V" right out of that as it goes down, and it shows a seam of a white substance around that rock, but that does not in any feature indicate a north and south vein; it is in bedrock at that point; there is not a northerly and southerly plane appearing on the southerly or westerly side or corner of that shaft,—I do not see anything there;

(Testimony of Louis Mason.)

I channeled out on the north side as well as on the south side and showed those walls running east and west. Mr. Shelton and Mr. Kemper examined that and took the pick and picked into the one near this granite boulder that I cut out.

Redirect Examination.

(By General NOLAN.)

The WITNESS.—The dip of the lead I encountered from the [1322] Olivia discovery to the No. 1 shaft is very near vertical; it has a slight dip to the north.

(Signed by the witness before the examiner, April 9, 1912.)

**[Testimony of Samuel Barker, Jr., for Defendants
(Recalled in Surrebuttal).]**

[1323] SAMUEL BARKER, Jr., heretofore called and sworn as a witness on behalf of the defendants, being recalled, testified as follows, to wit:

Direct Examination.

(By General NOLAN.)

By General NOLAN.—Will you mark that map (handing map to the examiner)?

By the EXAMINER.—I will mark this map Defendants' Exhibit No. 115.

By General NOLAN.—And mark this one, please (handing map to the examiner).

By the EXAMINER.—I will mark this one Defendants' Exhibit No. 116.

Q. Mr. Barker, I will call your attention to Defendants' Exhibit 115, marked so for identification,

(Testimony of Samuel Baker, Jr.)

and especially to the portion of the same that represents the ground in controversy. What do you say as to whether that is correctly on the map that we are talking about?

By Mr. SHELTON.—Of course, it is understood that our objection to the testimony, on the ground that it is not proper surrebuttal testimony, is considered as going in as to all this line of testimony, without the necessity of repeating it as to each question.

By General NOLAN.—Yes, sir.

A. The portion of the Defendants' Exhibit 115 east of the colored line, is a correct representation of the various openings, lines and workings, on a scale of two hundred feet on the ground as one inch on the map.

[1324] The WITNESS.—It correctly represents the east line of what is known as Mineral Application No. 888,—the Pittsmont mine; I furnished the eastern portion of the map to Mr. Williams, who made the rest of it, and the line that I just spoke of was also placed on the map as a base that Mr. Williams might work from, he having made a survey of that line.

Cross-examination.

(By Mr. SHELTON.)

The WITNESS.—All I know about this map is that it is a correct representation of the workings upon the ground east of the east end line of Application 888.

(Signed by the witness before the examiner April 9, 1912.)

**[Testimony of Daniel Williams, for Defendants
(Recalled in Surrebuttal).]**

[1325] DANIEL WILLIAMS, heretofore called and sworn as a witness on behalf of the defendants, being recalled, testified as follows:

Direct Examination.

(By General NOLAN.)

The WITNESS.—I made this portion of the map marked Defendants' Exhibit No. 115 (indicating), representing the Pittsmont ground, Application No. 888; the Pittsmont ground abuts the ground in controversy on the west,—that is, the east end line of the Pittsmont coincides with the west end line of the ground in controversy.

Q. I notice that you have some red lines on the Pittsmont ground. What do these lines represent?

By Mr. SHELTON.—That is objected to as not proper surrebuttal testimony.

A. They represent the Donner vein. The full line represents the Donner vein as opened up by drifts, that is to say, the twelve hundred foot level, that much of it opened up by drifts. And the dotted lines are projections.

Q. And the eastern portion of the red lines. I understand that you have two, four, five of them, with figures adjacent to them. Is that true?

A. Yes sir.

By Mr. SHELTON.—Same objection, same ground.

Q. And what did you intend to show by those lines thus existing,—with the figures existing?

(Testimony of Daniel Williams.)

By Mr. SHELTON.—Same objection, same ground.

A. Those represent the vein as opened up in those various levels by drifts.

[1326] Q. And in their course, did you intend to correctly represent the strike of the lead?

By Mr. SHELTON.—Same objection, same ground.

A. They are correctly represented.

Q. That is to say, in the case of the twelve hundred, you have the lead in its strike represented to the point where the line ends on its course to the east?

By Mr. SHELTON.—Same objection, same ground, and the further objection that it is leading.

A. Yes, those represent the vein as opened up on the twelve hundred level.

Q. I notice that in the case of the one thousand, and in the case of the eight hundred, you have dotted lines terminating the lines. Is that true?

By Mr. SHELTON.—Same objection, same ground.

A. Yes, sir.

By General NOLAN.—I am perfectly willing that every question I put him on this question shall be deemed objected to.

The WITNESS.—In the case of the lead on the one thousand level and on the eight hundred level, the easterly portion of the red lines is represented by dots or dashes, which represents the vein projected,

(Testimony of Daniel Williams.)

from the best information that we have at hand. In the case of the twelve hundred level and the thousand level and eight hundred level, and the six hundred level, the figures 70, 74, 85 and 90 represent the dip of the vein at those points; the Donner lead at the six hundred and sixty foot level has a dip of ninety degrees, or, in other words, it is vertical. I prepared a map showing a cross-section of the vein, which would show the dip of this lead; it is Defendants' Exhibit 116, and I have two red lines on that map; [1327] the line to your left represents the cross-section on the vertical plane at the western portion of the mine, as shown on Exhibit No. 115; the right-hand one represents a cross-section of the same vein looking east at a point at the extreme eastern point of the mine,—the line B-B; on the vertical plane A-A the dip shows,—that is, this one over here (indicating),—it shows at the twelve hundred, eight, seven and six, or six hundred feet of the vein, whereas, on the B-B it shows twelve, ten, eight and six hundred and sixty. Taking the lead in the eastern portion of the ground,—the most easterly portion of the ground, where the lead is exposed from the eight hundred to the six hundred and sixty foot levels, the dip of the lead through that distance would be probably about eighty-three degrees, and as you stope up on the vein it becomes straighter. In other words, it approaches the vertical as we went upward on the vein.

By General NOLAN.—We will offer these maps in evidence.

(Testimony of Daniel Williams.)

By the EXAMINER.—They will be received in evidence.

Cross-examination.

(By Mr. SHELTON.)

The WITNESS.—In projecting the vein easterly, where I have the dotted lines at the twelve and ten hundred foot levels,—on the twelve we have opened up a great deal farther east than we had on the ten hundred and eight hundred, and with those strikes it is no more than natural to dot that as showing that the vein would be that position at those various levels; and we have the ten hundred and the ten and eight, but not where it is dotted. You will notice throughout the map almost the [1328] parallelism that exists in that vein. It is no more than natural that we would expect that to continue on east; so far as the veins go I would consider that an excellent example of parallelism; at the eastern extremity of the map the lines are considerably farther apart than on the western, but you are considering a distance of over a thousand feet, whereas, I am only considering a couple of hundred feet; that is what we have for the veins to go by; as you go east those come together. I think the six hundred and sixty foot level on the Donner vein is about nine hundred feet lower than the elevation of tunnel No. 31,—about nine hundred feet difference in elevation; tunnel 31 would be about that much higher. The strike of the vein eastwardly of the point “70” is about seventy-two degrees north of east; it shows on the twelve hundred,—the vein again turns to the south; in fact that exhibit shows;

(Testimony of Daniel Williams.)

there is nothing to indicate how far south it goes or what its strike would be, except its behavior in the past through three thousand feet,—has been practically east and west. As to the behavior of the vein east of the line marked “Vertical Plane,” at that point east it has a northeast and southwest course, but you notice in through here (indicating) it has a northwest and southeast course; the vein is sinuous, and of course it varies from place to place; its variation in the east and west course is much greater east of that line for the distance that it is uncovered than it is west of that line, in some respects, and I could prophesy what the strike of the vein would be beyond the point where it is uncovered from its past behavior. Take it right here at the extreme western portion, you will notice its position north is practically the same; the general trend is east and west; it will vary somewhat between those limits; [1329] the extent of its variation on its course is an indeterminate matter to an absolute degree; the vein, as it was originally formed, extended above the point “90” for about nine hundred feet probably,—it eroded away; at the six hundred and sixty foot level the vein is practically vertical; I would expect it to dip to the north, as its general trend has been so general in that direction. I never would expect it to dip to the south; it might possibly have a very much more decided dip to the north above that point than it had at the six hundred and sixty foot level.

(Testimony of Daniel Williams.)

Redirect Examination.

(By General NOLAN.)

The WITNESS.—In my judgment, I would certainly think the vein would continue on.

Recross-examination.

(By Mr. SHELTON.)

The WITNESS.—It would continue practically vertical; I think that because we have to judge the future sometimes by the past, and I certainly would not try to pick out something that was more difficult than the things already shown. As you go up on the vein it becomes more vertical,—more nearly vertical,—and you certainly have to consider that. It is possible that it could happen that that could be a straightening of the vein through that portion of the dip only, and that above the six hundred and sixty foot level it would return to its normal dip; but I do not think it is the case at all. Between the [1330] six hundred and sixty and eight hundred it shows very nearly vertical; from the thirteen hundred to the six hundred and sixty the average dip is seventy-two degrees; if my development only extended upward to the eight hundred foot level, I might possibly have taken an entirely different dip for the vein in projecting it upward; we are a little clearer as to the dip of the vein above the six hundred and sixty foot level, because we have four hundred and forty feet of the vein exposed; therefore, we use that as a sort of a leading light. There are no veins besides the Donner vein there having an easterly and westerly course.

(Testimony of Daniel Williams.)

Q. In speaking of veins,—are there any fissures there having an easterly and westerly course, excepting the Donner vein?

By General NOLAN.—That is objected to as not proper cross-examination.

A. Why, not what I would term a fissure; no.

The WITNESS.—That have a width of an inch, couple of inches; we are not familiar with the ground to the south; farther north there are east and west veins, but I am not familiar with the part to the south.

Redirect Examination.

(By General NOLAN.)

The WITNESS.—Adopting the lamp of experience, if, as a matter of fact, the work was prosecuted on the lead towards the surface to the point where my pencil is (indicating on map), and excluding this one hundred and forty feet, if I were then asked what, in my judgment, was the dip of the lead extending towards the surface, I would certainly say that it [1331] was as indicated by the portion exposed; and the four hundred and forty feet being exposed, and coming towards the surface with the dip established, or with the fact established that there is no dip at all, in the light of the disclosure, as to whether or not, extending towards the surface, I would say that it would preserve the same dip. Observing the strike of the lead at the twelve hundred foot level, and especially that portion of same east of what is designated the “Vertical Plane,” in the light of the exposure of the lead west of there, I would not say

(Testimony of Daniel Williams.)

that the strike of the lead would be as indicated by your pencil, following the course as it is disclosed immediately east of the vertical line,—I think the vein would continue on practically east and west. If the lead were only exposed to this point where we have this depression here (indicating on map), and without any disclosure made east of that point, the lead there, as it was projected, would have a strike southeast and northwest; the entire lead as disclosed has not that kind of a strike, so that, having in mind this particular piece of it east of the vertical line to which my attention was invited by Mr. Shelton, it would not be a fair basis for estimating the course of the lead by simply confining my observation to that particular piece, without considering the lead upon its entire strike as disclosed.

(Signed by witness before examiner, April 9, 1912.)

[Testimony of I. H. White, for Defendants (in Surrebuttal).]

[1332] I. H. WHITE, duly called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination.

(By General NOLAN.)

The WITNESS.—My name is I. H. White; at the present time I reside at Blackfoot, Idaho, Bingham County; I am a miner, and have followed that for thirty-two years,—quartz mining. I mined in Silver Bow County; I was a resident of this city for fourteen years, and worked in numerous mines here,

(Testimony of I. H. White.)

as an underground miner, practical miner; I have also worked as a miner in Wyoming, Idaho, California, British Columbia, Alaska, as a practical miner; during that time I have held a position from working the the sump to general manager. I was at the Observatory Inlet, in Alaska; I was at Goose Bay, Observatory Inlet, for two years and ten months, and during the time I was there I was resident manager of the Hidden Creek Copper Company. I have met Mr. Winchell; he made a report on that property at Hidden Creek at one time. I tested that property for one hundred and fifteen feet below sea level, which was about a thousand feet in depth; the assay values are better at a thousand feet in depth than they were on the surface. If Mr. Winchell made a report that that property really had no value as a mine,—that there was simply this deposit on the surface, with no depth at all, I should certainly say that it has not been sustained at all in any way whatsoever, because the actual development work proves that it was the contrary. He made a written report.

[1333] I saw the report that he made; that is a copy of the report Mr. Winchell made that you hand me, on the Hidden Creek property that I had charge of the development work for two years and ten months.

By General NOLAN.—Mark that (handing report to the examiner).

By the EXAMINER.—I will mark this Defendants' Exhibit No. 117.

The WITNESS.—It is a correct typewritten copy

(Testimony of I. H. White.)

of the report made to Mr. M. K. Rodgers of Seattle; the original of it is in Room 707 American Bank Building, Seattle, Seventh Avenue.

By General NOLAN.—We will offer this in evidence, Defendants' Exhibit 117.

By Mr. SHELTON.—We object to the offer of the copy, without some evidence to show that the original is not obtainable after proper effort to obtain it, for the reason that it is not the best evidence.

The WITNESS.—I went over on this ground in controversy this morning; Mr. Bowman went with me, and I went into the deep shaft, No. 21 shaft it is, and I made an examination of the ground in the shaft and also in the cross-cut running to the south. I would consider that there was the measures of a vein, vein matter, disclosed in that cross-cut and in that shaft; I would consider it in a northeasterly and a southwesterly direction, from my observation there; I had no time to take any points or anything of that kind; it was simply from observation. The dip has a northerly direction. I also went into shaft No. 1; there are three holes there right close together.

By Mr. SHELTON.—This, of course, all goes in subject to the general objection that it is not surrebuttal testimony?

By General NOLAN.—Yes.

The WITNESS.—I also went into the Olivia Discovery shaft. [1334] I would consider that there was a wall there in those shafts, and vein matter, that would be indications that any practical miner would work on, and the course of that lead was following

(Testimony of I. H. White.)

an easterly direction,—easterly and westerly, and it had a northerly dip.

Cross-examination.

(By Mr. SHELTON.)

The WITNESS.—I live at Blackfoot, Idaho, and have had a residence there for two years; at the present time I have not any real occupation; I have retired; I had interests in that section of the country before I took up my residence there; I came down from northern British Columbia and southern Alaska two years ago in October and bought a residence there, and I have made that my home since, but I have not resided there all the time since; I was in southern Alaska last summer most of the time, but my family lived there; that is my postoffice address. The report of Mr. Winchell I referred to was made to Mr. M. K. Rodgers, in the interests of the Daly estate; there were two reports there; one is made on the Hidden Creek property and one on the Mineral Belt, some on the one on the Observatory Inlet, on the Goose Bay, and near the international boundary line between British Columbia and Alaska. I took a bond on that property in 1907 with other parties, and worked about a year on it, and turned it over to Mr. Rodgers and Mr. Hodgins; the bond and lease I had run for two years, and I worked under it for twelve months; at that time I took up the option and turned it over,—paid the option price of forty-eight thousand dollars; I had a lease on the Hidden Creek, eight claims; there [1335] was the Rudge,—I cannot remember the names of all of them; that is the

(Testimony of I. H. White.)

principal claim that the showing was on; I have a map of those that I could familiarize myself with very shortly. I obtained a lease on them in August, 1906, and done the work in 1907; when I obtained my lease on that, there was probably one hundred and fifty feet of development work done on the property at that time, in tunnels, all told. When Mr. Winchell made his examination there was about one hundred and fifty feet, about the same thing as when we took it up; they worked a short time after Mr. Winchell made his report; Mr. Winchell's report was on the same claims upon which I had a lease; at the present time the Gramby Copper Company of British Columbia have charge of the property; Mr. Hodgens sold his interest in the property; the property is being worked now; a smelter is being put up on it at the present time; they are building a smelter, making preparations for it; they are not taking anything out; they are developing ore at the present time; they are employing sixty men at the present time. Mr. McDonald and Mr. O. B. Smith and Mr. G. Roy Williams are interested in the Gramby Company. I done about four thousand feet of open cut work. I drove what was known as the Concentrate Tunnel, and I drove the main working tunnel seven hundred and eighty feet under that hill, tapping it at depth of four hundred and eighty feet in depth; the greatest depth obtained by me was a thousand feet, by diamond drill work. The diamond drill work is from the four hundred and eighty foot main working tunnel. I went there and stayed two months with the

(Testimony of I. H. White.)

Gramby people after they took the option on the property. This work was done, going down a thousand feet while I was there. The Bonanza and the Hidden Creek are about one and a half miles apart, on Goose Bay; there has been [1336] nothing done on the Bonanza property since Mr. Winchell made his report. I could not say anything to the contrary about Mr. Winchell's report on the Bonanza property, because there has been nothing done since. There is a report in regard to the Hidden Creek property and the other is in regard to the Bonanza property. Mr. Winchell's testimony here in court related to the Bonanza property, most of it, or under conditions that he found at that section of the country, but I notice that he winds up and takes in everything from the Alaska boundary to the Canadian line. I did not make any effort to obtain the original of those reports, to produce them here; I asked for the original and they gave it to me, and I had a copy stricken off, but for use here I have made no effort to obtain the original. I run a gold property in Alaska for a year or so. In Butte I worked in the Rarus, I worked in the Blue Jay, I worked in the Snohomish, I worked out west in a good many of these silver mines, I worked in the Germania, I worked in the old Blue Bird, I worked in the two Goldsmiths; in fact, I had so many jobs in Butte in fourteen years that I cannot remember them; I was shift boss a number of times; I was shift boss of the Blue Bird and of the Germania. In the bottom of shaft 21, the material was some granite, some quartz,

(Testimony of I. H. White.)

some little porphyry, mixed, I would consider it, yellowish, some yellowish, some brown, iron stained, some showed considerable iron; there was some there that I would consider talc, vein matter talc; it was all of a yellowish color; it would not be considered picking ground; it would depend on how you was working whether it would be considered picking ground or not; if you were sinking on it, it would not; if you were stoping probably it would. I saw no indications there of the use of [1337] powder or drill; the property was not working; I would not expect to find it there; I did not pick in it; I did not examine it to see whether there were small particles with a rounded surface,—I did not have the time; if I found such particles, as a practical miner I would consider it faulting, drag ore; that would indicate movement. At the bottom of the shaft the length of the greatest development is probably twenty feet, considering that this little drift they run in there was running in a southerly direction. I would not say positively it was, because there was no compass along. In the face of the north side there was the same material that there was in the bottom of the shaft. I did not notice any wall,—not what I would take as a permanent wall. Of course, my examination of that was just in a few moments, and really I am not qualified to make any statement in regard to that; I would not undertake to tell you whether it was a vein or a fault,—it could be either; really I would want to do more development work at that point; it is very near the surface of the bedrock there; I would consider

(Testimony of I. H. White.)

that the wash was within five or six feet; there are generally deposits along the surface; there is always an alteration by minerals; there is some stain generally, but generally the mica determines that, the amount of mica in the granite; if I found mica in the granite I would consider it country rock. I looked at the northeast corner of that shaft at the bottom, and there is granite mixed with it, bunches, but I would not say whether that disappears along the north side of that shaft as you go toward the west, because I did not have the time to put into it to make a study; I was just simply out there between two cars. I would say that farther east I looked the thing over, and I considered from the showings I [1338] saw there that any practical miner would be willing to go to work there on any reasonable terms; that is at the Olivia discovery; I am not referring to 21; in fact, I did not stop long enough at 21; I do not suppose I stayed there quite two minutes. There is some difference in opinion in regards to aplite dykes between the geologist and practical miner; what geologists call aplite dykes and a great many practical miners,—would call quartz or quartzite, or a mixture,—that and other formations; as a rule what is generally termed aplite by those people, it is generally pretty good indications to follow, I consider, in this district. I never as a practical miner tried to sink on an aplite dyke and develop it; I do not know that aplite is called one form of country rock; I am not a geologist; if I find the ore I work on it. In the Olivia discovery I found some

(Testimony of I. H. White.)

pretty good looking ore, something in the shape of copper, malachite, green stained, in the Olivia discovery, and following along the vein in the Olivia discovery; the vein itself would be considered an altered granite, with some iron stains in it. I found iron stains in shaft No. 1, but I do not recollect seeing any green stains in that one; I found the green stains in the Olivia discovery around the sides and the walls,—what is considered the walls there,—the walls of the vein. I did not see any country rock at that point, what I consider country rock. It was what I considered altered rock. As a matter of fact, the depth there,—in fact, it all shows to be altered, too, to a more or less extent, at that point. I passed through the cross-cut between the Olivia discovery and shaft No. 1, but in going through the cross-cut, I did not enter it from the 'Olivia, but from shaft No. 1. [1339] I could not say where I encountered the green stained rock in going through the cross-cut; my examination was so hurriedly made that I really ought not to give anything on that at all, because these other witnesses here are more acquainted with this thing than what I am, and you know yourself that to go down there for two or three minutes to go through that and see the ore there,—two or three feet,—that would look good to a practical miner. Shaft No. 1 showed mineralization on the selvage. You cannot tell whether that is a wall until you get into that; I would not say that was a wall or was not a wall, simply the measures of the granite there, mineralized to a certain extent with iron; the meas-

(Testimony of I. H. White.)

ures run east and west with a dip to the north; the material shows a little more quartz, little more iron along next to the measures than it does farther out, runs in seams; some of the wall of the shaft was in altered granite, mineralized with iron, some little copper in it; I call that vein material, and the south wall of the shaft was the same, and there is some green copper stain in that shaft, mostly iron shows in that, brown iron stain, than anything else. The green stain appeared in shaft No. 1 along the coating of the seams in the altered material; in fact, that surface,—work is so close to the surface that it is all altered, and as you go away from this stain and iron, as you go out, you have got to go to a considerable distance in the cross-cuts before you find any mica along the cross-cut; if there had been mica there I would have had a different opinion.

I worked in the Blue Bird, and the country rock around there is granite, more of what they term a sandy granite, and in the walls there is mica, but not inside of the vein; white granite is peculiar on account of lack of mica; very often you [1340] find that white granite carrying high values in silver; in fact, in the Silver King, during that litigation there, I found in sampling there that the granite, where it was not altered to a very great extent, carried high values,—out here next to Missoula Gulch. White granite in some places might be termed country rock, but if it is mineralized it would not be country rock, if it was of commercial value. The absence of mica is something you cannot depend upon in all cases as

(Testimony of I. H. White.)

indicating a vein; in fact, I never found anything, any rule that you could go by in working underground workings that would define the thing definitely in there. I found no more talc in shaft No. 1 than a slight selvage in the seams; I would not consider it hard; in going east in this cross-cut toward the Olivia shaft, I found nothing that I would consider a true wall; in fact, it is too close to the surface for any one to determine whether it is a true wall. The principal mineral indications there are iron; I consider any time you find iron near the surface,—the iron is the first to leach; they will naturally go below and deposit, and of course, next to the surface there is nothing left but the iron; I am speaking of veins or anything that is open enough to let the solutions go down; I did not see any iron stains that you would consider, in the granite, where it carried the mica; iron stains are not confined entirely to veins because the iron stain, if the granite is open enough to let the solution through, of course it will stain down as far as it stains in any kind of material, any kind of rock; I never assayed anything outside of what I considered vein matter. I was on my way to Seattle on a case down there, and I met Mr. Clark; I have known him for a long time, thirty years; we are old acquaintance, and in talking over this case the Winchell [1341] proposition came up, and he wanted me to give him an idea where I considered Mr. Winchell had been mistaken in his ideas. I am not related to Mr. Clark; my acquaintance with him has been places where I was working; he was en-

(Testimony of I. H. White.)

gineer where I was foreman of the property west of Walkerville some year and a half or such a matter. Outside of that my acquaintance with him is simply meeting him here in the city; I stopped over on my way to Seattle to meet Mr. Hodgens on his way from New York; I got in here Monday evening and stayed over Sunday evening, at the request of Mr. Hodgens; I got back from Seattle last night; I have not stopped over in regard to this.

(At this time it was stipulated between the solicitors for the respective parties that, owing to the fact that the witness I. H. White was compelled to leave the city at once, and being a nonresident, that his signature to the foregoing deposition should be waived.)

**[Testimony of P. A. Stevens, for Defendants
(Recalled in Surrebuttal).]**

[1342] P. A. STEVENS, heretofore duly called and sworn as a witness on behalf of the defendants, being recalled, testified as follows:

Direct Examination.

(By General NOLAN.)

The WITNESS.—I examined the cross-cut in the deep shaft on the northerly lead made by Mr. Mason since the last hearing.

Q. Do the disclosures in that cross-cut in any manner change the views heretofore expressed by you as to the existence of a lead in the shaft, having an easterly and westerly course and a northerly dip?

By Judge BOURQUIN.—Objected to as incompetent, in that it is not surrebuttal testimony, and also

(Testimony of P. A. Stevens.)

for the reason that it calls for a conclusion of the witness.

A. This last visit, or the visit that I made down the shaft lately, is the first time I have been down that shaft.

The WITNESS.—I was in the shaft last Friday night, and noticed a cross-cut running to the south in the shaft.

Q. What were the indications there as to whether that was a fault running north and south, or whether it was a lead running east and west?

By Judge BOURQUIN.—Objected to as heretofore, and it may all go in subject to the objection?

By General NOLAN.—Yes, sir.

A. It shows to me good ledge matter, with one very well defined wall running east and west. All the stratas that shows in the cross-cut and also in the shaft has an easterly and westerly course.

[1343] The WITNESS.—I also made an examination of a cross-cut extending from the Olivia discovery shaft to the No. 1 shaft, and there was a lead exposed in that drift and there is a lead in the wall. When I was in the Olivia discovery on last Friday, the drift extended then west about eight feet; on yesterday afternoon I went out and found that that drift had been continued to No. 1 shaft and was connected to the northeast corner of that shaft, showing the continuation of the wall that is shown in both the east and west sides of the Olivia discovery, and running straight through and striking the same wall on the north side of No. 1 shaft. The lead I encoun-

(Testimony of P. A. Stevens.)

tered in the Olivia discovery, and the lead I encountered in the drift running to the No. 1 shaft, and the lead I found in the No. 1 shaft, are the same, running straight through; it is the hanging-wall. I got samples recently for the purpose of having them assayed, from this ground, and I took them to Mr. Hocking, the assayer, on East Granite Street, and delivered them to him to assay, and I obtained a certificate from his showing the assay returns from the samples furnished; Defendants' Exhibit No. 115 is the certificate I obtained from him. The first sample is No. 0, which was obtained in the south cross-cut, shaft No. 21,—the small cross-cut running to the south; the assay return from that is one one hundredth in silver, and twelve one hundredths in copper, and seven and nine-tenths per cent iron. The next sample is marked No. 00, and came from the red stratas or streaks around in the bottom of shaft No. 21,—within some two or three feet of the bottom of the shaft, and shows one one hundredths of an ounce in silver, sixteen one hundredths in copper, and seven and four-tenths per cent iron. [1344] The next sample is No. 1, taken from the shaft No. 1, taken from the north side of the shaft, the extreme length of the shaft, and for a distance of several feet up the side of the shaft, and the assay values are one-tenth of an ounce in silver, a trace of copper, and twenty-nine and one-tenth per cent iron. Where I said one one hundredth of an ounce in silver I meant one-tenth; in all of the samples I have testified about up to this time, the silver value is one-tenth of an

(Testimony of P. A. Stevens.)

ounce, in each of them. The next sample is No. 2, taken from the drift run from the bottom of the Olivia discovery shaft,—run west about eight feet; it was not connected at that time; it was run in about eight feet, showing the wall,—the hanging-wall of the lead exposed for a distance of eight feet, and lying on the south side of the drift; this sample was taken the extreme length of that wall, and the returns are one-tenth of an ounce in silver, ten one hundredths per cent in copper, twenty-eight and eight-tenths per cent in iron. The next is sample No. 3, taken from shaft No. 2, from the north side of the shaft, the entire length of the north side of the shaft, and for a distance from the bottom up,—I have not got no notation of how far I took it up,—up and down the shaft for several feet, and on that side that the wall shows; the assay returns are one-tenth of an ounce in silver, twenty-seven one hundredths per cent copper, and twenty-four and one tenth per cent iron. The next sample is No. 4, and was taken in the north cross-cut from the Rabbit tunnel. The north cross-cut is in about,—to the north about twenty feet, I should judge, from the mouth of the Rabbit tunnel. In explaining that sample I would like to state that I found that that cross-cut had been driven to the extent of about ten feet farther than on my last examination. [1345] It extended about two feet in the hanging-wall,—beyond the hanging-wall part of the lead. No. 4 sample comprises three feet of the hanging-wall, of the ore underlying the hanging-wall, or to the south from the hanging-wall,—three feet of the

(Testimony of P. A. Stevens.)

lead, and an average of that ore for a height of three feet from the bottom of the cross-cut. The cross-cut I am talking about now is the north cross-cut in this tunnel, and when I testified before the cross-cut was not driven as far north as it is now; it was in about twenty-five feet, I believe, at that time; it is now driven about ten feet farther, and I have taken samples of all of the new work; No. 4 sample is the first one south from the hanging-wall of three feet, and is one of the samples I obtained in that cross-cut; the returns on sample No. 4 are five-tenths of an ounce in silver, and fourteen and fifty-five one hundredths per cent in copper,—a little better than fourteen and a half per cent. The next sample is No. 5, taken from the same place, continuing south from where the other sample was taken, or starting at a point three feet from the hanging-wall in the north cross-cut and running south for a distance of five feet, taking an average of that three feet high and across the lead for five feet, and the values are one-tenth of an ounce in silver and one per cent and twenty-six one hundredths in copper. The next is sample No. 6, taken at a point directly south, or at a point eight feet south from the hanging-wall shown in this cross-cut, and taken for a distance of two feet, and the returns show three-tenths of an ounce in silver, and nine per cent and fifty-one one hundredths in copper. The next sample is No. 7, taken in the drift,—the east drift, or in this Rabbit tunnel, starting at a point about thirty feet east from the cross-cut already mentioned, and sampling for a [1346] distance

(Testimony of P. A. Stevens.)

along the tunnel there for thirty feet, and about a width of about two feet across the bottom of the tunnel, on the left hand side, on the north side, and up the tunnel for fully half the distance, and at one place taking ore out of the north wall in it for a distance of about one foot, as far in that wall of ore as I could get in; the value of that sample as shown by the certificate is four-tenths of an ounce in silver, and eight per cent and twenty-five one hundredths in copper. The next is sample No. 8, taken a little farther east, some twenty feet east in this tunnel, in the small cross-cut to the north from the north side, where the hanging-wall of this lead is exposed, and also taken twenty feet farther east, or at the extreme breast, where the hanging-wall shows again, this sample comprising ore from both places, as that is the only place that the hanging-wall shows in the face of that tunnel; the returns show four-tenths of an ounce in silver, and eight per cent and seventy one hundredths in copper; a portion of this sample was obtained in the face of the tunnel, at the south side, as the hanging-wall crosses the tunnel, in the last twenty feet, and the balance of the sample was obtained back twenty feet from the face of the tunnel in a small cross-cut that is run in about eighteen inches or two feet in the north wall, where the hanging-wall of the lead is exposed; I combined those two samples because there is practically no difference in the looks of the rock; I am very familiar with that kind of ore out there, and it is the points where the hanging-wall showed in there, and I just combined the samples to-

(Testimony of P. A. Stevens.)

gether. The next sample is No. 9, taken from the Mullins tunnel, the first five feet of the cross-cut running south towards the Gulf shaft,—from the south side of the Mullins tunnel, south for a distance [1347] of five feet, and taken at a distance of two feet up from the bottom of the cross-cut,—south to the Hornet discovery, to the Gulf shaft, as that east side of that cross-cut will wind up against the Gulf shaft,—a distance of five feet and two feet above the bottom of the cross-cut; the sample was taken continuously of the material throughout the distance of five feet, and the returns show three-tenths of an ounce in silver and six per cent copper and forty-eight one hundredths. The next sample is No. 10, and was taken on the same level, in the same cross-cut, south from the Mullins tunnel; I commenced that sample at a point five feet south from the south side of the Mullins tunnel, or where I left off from taking No. 9 sample, and continued for a distance of five feet, and the same distance from the bottom of the cross-cut as No. 9 sample; No. 10 sample shows returns of one-tenth of an ounce in silver, and one per cent and sixty one hundredths in copper. The next sample is No. 11, and is a continuation from the part where I left off taking No. 10 sample, and runs to the end or corner of the Gulf shaft, which is a distance of six feet, taking two feet above the bottom of the cross-cut; these samples are all taken along the east side of the south cross-cut, and the sample yielded one-tenth of an ounce in silver, and one per cent and twenty one hundredths in copper. The next sample

(Testimony of P. A. Stevens.)

is No. 12, taken from the west side of this south cross-cut, between the Mullins tunnel and the Hornet shaft, starting from a point directly west from the corner of the Gulf shaft, or from where I left off taking No. 11 sample, and running south a distance of five feet, taking two feet,—a streak along two feet up from the bottom of the cross-cut; sample 12 shows one-tenth of an ounce in silver, and two per cent in copper and eight one hundredths. [1348] Sample No. 13 was taken from a point from where I left off with sample No. 12, or at a point five feet north from the corner of the Hornet discovery shaft, and running south a distance of five feet, to the north side of the Hornet discovery shaft, two feet above the bottom of the cross-cut, and shows one-tenth of an ounce in silver, and two per cent and sixty-four one hundredths in copper. Sample No. 14 came out of the Hornet discovery shaft, and was taken from the north side on a level, at a point that would be on a level with where I left off taking sample No. 13,—on a level with that,—running around and along the north side of the shaft, and also the east side of the shaft on that level, and for a distance of about three feet east and west on the north side of the shaft, and about,—what did I say,—four feet,—and about three feet across the east end of the shaft, and shows two-tenths of an ounce in silver, and six per cent copper and thirty-seven one hundredths. Sample 15 was taken down in the Hornet discovery shaft at a point about seven feet above the bottom; that was taken between the upper cross-cut running north, and the lower cross-

(Testimony of P. A. Stevens.)

cut running north, which brings it, at that point, about seven feet from the bottom and was taken from the east side and the west and north sides of the shaft, running right around the shaft at that point, with three sides; No. 15 returns a value of two tenths of an ounce in silver, and five per cent and forty-five one hundredths in copper. Sample No. 16 was taken in the lower cross-cut running north from the bottom of the Hornet discovery shaft, taken on the west side of the cross-cut, the extreme length, or for a distance of somewhere in the neighborhood, of twenty-five feet taken at a height of about two feet from the bottom of the cross-cut all the ways around; No. 16 returned a value of [1349] one-tenth of an ounce in silver, and two per cent copper and fifty one hundredths. Sample No. 17 was taken from the so-called hanging-wall in the drift that underlies the Mullins tunnel, I should judge about ten feet below the Mullins tunnel,—something like that,—from a fault that shows there, east a distance of about twenty feet, taking practically an average sample of the whole wall that stands there, and in several places in for several inches, where the ore was broken out so I could sample,—kind of a general sample of that so-called hanging-wall, I believe, of the Mullins vein; it is all ore that I sampled, and several points, especially in the east end where I could pull down some of it, I pulled back for a foot and took that in along with the sample; No. 17 returns a value of two-tenths of an ounce in silver, and six per cent and ninety-four one-hundredths in copper.

(Testimony of P. A. Stevens.)

By General NOLAN.—This is offered in evidence (referring to Defendants' Exhibit No. 114).

By the EXAMINER.—It will be received.

The WITNESS.—The samples I took was as fair an average as it was possible for me to take my samples, and the samples, according to my opinion, give a good representation of the rock showing; I make that assertion from my knowledge of the character of that kind of ore in that community, my experience in sampling and mining and handling it; I have handled ore similar to this in the Bullwhacker, and in the Sarsfield also, which lies a little north of them.

[1350] Cross-examination.

(By Judge BOURQUIN.)

The WITNESS.—Some parts of the ore which I took out of my lease on the Bullwhacker is like the ore in the Mullins vein; the stained granite is very similar to what showed in the upper workings. I have observed the ore that is now in the Bullwhacker bins, and that is what I call stained granite; that is a silicate ore, what is in there; it don't come out of a vein,—it comes out of a fault or dyke; that is what I was working in the Bullwhacker, and I was taking ore out of the Bullwhacker like is in those bins. The ore that did pay that I took out of the Bullwhacker is very similar to some of the ore that is in this ground,—very similar in character, but not exactly like it; the ore I mined in the Bullwhacker was much heavier than anything that showed there, that is, of the common run; the material exposed in the cross-cuts from the Hornet shaft is stained granite,

(Testimony of P. A. Stevens.)

with here and there a little cuprite,—sulphides through it; I call cuprite sulphide ore; I don't know what else you can call it, and when I say there was sulphide exposed in the material exposed in the cross-cuts from the Hornet shaft, I have reference to cuprite; I did not see any this time when I was sampling, but I saw it before when I was taking samples for this court, along the bottom of these cross-cuts; I did not see any cuprite where I sampled in the Hornet cross-cuts, but I could not help see it all along the bottom of the cross-cut, laying loose; I do not remember that I saw any in the walls of the cross-cuts, because I was not looking down at the bottom, because I was taking my sample from a certain point; I do not think that I noticed a seam [1351] with cuprite in it; there might have been a seam, a seam that was a little greener, or a seam that would lead, maybe, up to a little bunch of cuprite, but I do not remember that there was any of it in those samples; in taking my samples I did not cross many of those seams filled with green material, but there were some; I took a general sample of everything I crossed. The green filling of the seals I crossed is the same green that is in the rock that was shown on the table here; it was not chrysocolla, because chrysocolla don't lay in there very much; I did not see any chrysocolla in those Hornet cross-cuts; in fact I did not break any of the rich ore, which would show the chrysocolla; I mined two streaks that was solid chrysocolla and copper wax, of two or three feet wide, in the Bullwhacker, and I

(Testimony of P. A. Stevens.)

think I know it when I see it; I did not see anything there that I call chrysocolla at all. I was in shaft 21 Friday evening, and the cross-cut was in south, some eight or ten feet, or a couple of feet,—the top part of it was farther than the bottom; there was a wall showed there, slanting; the top of the cross-cut was in a little farther than that; the bottom of the cross-cut showed where it was slanting, that is where I took No. 0 sample from. This wall I speak of is about seven or eight feet in from the south of the shaft, and by wall there I mean a direct wall running east and west; the material north of it I call ledge matter, and on the south of it it looked a good deal like ledge matter too; by wall I mean a very definite dividing line in the country there; I would not call that a striation; I call it a good, well defined wall or seam; I call it wall for this reason, that this is so much the footwall part of it, or the under part of that is so much harder than the top part of it; consequently I have got to call [1352] it a wall; I suppose the filling was three-quarters of an inch; there is where I got my sample; I took it off that wall as far as it was exposed; underneath it it was very solid,—a porphyritic quartz,—pretty solid formation at that; it was only opened on a slant, up two or three feet; the cross-cut did not extend several feet south of that,—not where that wall is opened, it did not extend a foot; that was overlying the end of the cross-cut going south; the wall raised up—come up about to a height of two feet, possibly, above the bottom of the cross-cut, and it was then into the breast; it

(Testimony of P. A. Stevens.)

was up within the top of it,—way up then to the cross-cut; that was about, I should judge, four feet or four feet and a half above the wash. The wash come down lower, if I remember right, on the east side of that cross-cut, than it did on the west,—appears to be kind of a sag or a hole, practically a roof of the bedrock,—what it appeared to me to be there. There had not at this time been any channeling on this wall at that time; I did not see any other walls in that cross-cut or in shaft 21; I see seams and stratas running east and west and dipping very much to the north, dipping quite flat. I saw no indication of a fault in 21, and I looked around the walls very thoroughly; I could not see—did not discern any resemblance of a fault in the bottom of shaft 21 whatever; the bottom was clean when I was in it,—all the loose rock was out. I examined the material exposed in the shaft and the cross-cut to determine whether or not there was any drag material in it, as indicative of fault, and did not find any. I do not believe I was in court when Mr. Wilson testified; I took a sample from around that shaft, 00 sample came from the bottom of that shaft; I sampled the red in that shaft,—the red stratas that run east and west and [1353] lie quite flat, dipping to the north, exposed both in the east and in the west end of the shaft, principally in the west end; I took it out of the west end of the shaft, and I gouged that filling that was in those seams out, and that comprises No. 00 sample. The surface of the bedrock, I should judge, was about—I took those up and down that

(Testimony of P. A. Stevens.)

west end of the shaft, the full width of the shaft north and south and up and down, two and a half up,—two and a half feet from the bottom, and across the shaft north and south, and five feet below bed-rock; I took this out of several stratas, to see whether there was any mineral-bearing rock in that shaft, or in that granite; there were several of those red stratas crossing the west end of the shaft, towards the north, from the southerly side towards the north, crossing from the south, down and disappearing down in the bottom of the shaft, and also on the north side; those stratas were from a quarter of an inch to an inch; I call them seams in the apex of a vein; the exposure of the material on each side of the seams was of a talcy, or a decomposed porphyry matter, ledge matter, I call it; I would not say that it was like material found in faults. Ledge matter is whatever comprises the apex of your lead, maybe crushed quartz, maybe granite or porphyry or quartzite, or anything else; porphyry in a fault has not got the same appearance, because generally in a fault you have got the drag, and in the top of the ground you have not got that condition; that is the only reason I say it did not present the appearance of fault material. These red stratas are principally iron, I should judge, and which my samples have demonstrated. Sample No. 0 was taken in the cross-cut; I believe I stated a little bit ago that that sample was taken from the wall that showed in that cross-cut, the wall [1354] running easterly and westerly,—the wall that I saw near the face; I sam-

(Testimony of P. A. Stevens.)

pled better than say two feet high, and two and a half feet long, the full width of the cross-cut; I think two feet and a half would comprise the width of that cross-cut,—two feet up on the wall, and across the cross-cut, two feet and a half, the full width of the cross-cut; the material exposed there is about half, or possibly three-quarters of an inch thick, and that was the width of the seam I sampled for No. 0 sample.

I took sample No. 1 from No. 1 shaft, along the north side; there was iron oxide lying on the wall, on the north wall of the shaft, and also what has been proven later to be what I call the hanging-wall of the lead that has been shown to run through the Olivia discovery and on to No. 2. I took No. 1 on the north side of shaft No. 1, along the north side; the hanging-wall don't lay to the south of shaft No. 1, but it lies to the south of the drift or tunnel, but that does not bring it south of the shaft No. 1, but very little; there is a curve of a very few inches in the last of that tunnel. The tunnel where it enters the shaft is not to exceed two feet wide; the part of the tunnel south of the north wall of the shaft is a very few inches wide; the tunnel, in entering the shaft, broke out the north wall; the south side of that drift or tunnel constituted a hanging-wall of a vein all the way in to the No. 1 shaft; the same hanging-wall on the south side of the drift or tunnel also constitutes the north side of the shaft practically. The north side of shaft No. 1 is practically perpendicular, and that hanging-wall is almost perpendicu-

(Testimony of P. A. Stevens.)

lar; it shows the indication of a seam on the north side of the shaft; what I sampled, this iron oxide, lays practically in the wall there, and is not cut into [1355] so as to show how wide it might be; it composes the wall at that point. I sampled that for my sample No. 1, took it all over the length of that shaft, and up and down for a distance of three or four feet; the iron oxide, to a certain extent, was scattered in places in and on the wall; the wall was not all this iron oxide. No. 2 I took out of the drift running west from the Olivia discovery, out of the south side of the drift, what I called the hanging-wall of the lead; on the north side of that hanging-wall, as exposed in the drift there is white granite, but not aplite; I saw lots of aplite in that cut; I mean the ordinary gray granite showing the mica, but of a more decomposed nature, on account of its close proximity to the surface of bedrock; I did not examine that bedrock very closely, but there possibly would be a little iron in it; the parts I sampled presented almost entirely a plane face of iron oxide entirely covering the south side of that drift; I sampled for a depth of an inch or two; generally this seam was not over half an inch or an inch thick, and I sampled places where it was wider than that; I cannot say what laid to the south side of where I sampled, because I did not cut into it. There was ledge matter on the south side of shaft No. 1, composed of porphyritic quartz, and what I would term as a ledge matter, overlying the top of the lead, just the same as I found,—practically no difference,—in the underlying of the hang-

(Testimony of P. A. Stevens.)

ing-wall of the No. 1, or Olivia discovery. I am not a geologist, and am not in a position to state what that ledge rock is composed of; there was undoubtedly some granite in it; there will be a slight percentage of granite, but I did not see it in this ledge matter, and I did not see aplite in it; I saw porphyry and quartz in it; that is the only minerals or materials that I [1356] could say I recognize as knowing what they are; it is there, as I term it, the top of a ledge matter; it is not crushed and mixed up to any great extent, although it is quite loose. I have observed amongst the numerous exhibits here any of the porphyritic quartz that I say I saw; there should be some here from No. 1 and 2 shafts also. I have seen the exhibits from shafts 1 and 2, and that is what I term porphyritic quartz. No. 3 sample was from shaft No. 2, the north side for the entire length, and up and down from the bottom, several feet; the exposure there is very similar to the exposure in No. 1 shaft. I saw no aplite in shaft No. 2. According to my knowledge, and what I could see, I will say there is no aplite dyke running through there northerly and southerly; it might be called by the geologists aplite, but I don't call it so; I call it porphyritic quartz, the apex of a ledge. I did not see any of that porphyritic quartz running north and south in shaft No. 2. I did not see anything that would correspond in strike or appearance with what Mr. Barker said was an aplite dyke running northerly and southerly in shaft No. 2. In sample No. 2 I did not take in any of this porphyritic quartz. The

(Testimony of P. A. Stevens.)

seam of iron oxide in shaft No. 2 where I sampled for No. 3 was very similar to my samples in No. 1, of the drift running west from the Olivia discovery, half an inch up to an inch; that seam covered the entire face of the north side of shaft No. 2,—the entire length of the shaft east and west,—more prominent in some places along the wall. I have no notation of how high it was going up in the shaft, but if I remember right, about half ways to bedrock, and that shaft is a four by four shaft, has two sets of timbers in it, and the bedrock,—the sample,—the bedrock lies right at the bottom of the second set of timbers. [1357] Those two sets of timbers are short, and I believe my sample was taken about half ways between; that would be about five or six feet up and down the shaft that I took the sample, and that seam covered the north wall of the shaft for that distance up and down and clear across it east and west; the wall of the shaft and the seam seemed to be identical, very little variation; I only included that seam in my sample for the reason that the balance of the ledge was close to the bedrock; I did not consider it would carry but very little mineral, if any. I went in the tunnel about thirty feet, and went in the north cross-cut, the face of the north cross-cut and took sample No. 4, which was an average sample taken three feet wide and three feet high from the bottom of the cross-cut; it covered the three feet from the bottom,—it covered an average of three feet square up from the bottom of the cross-cut; I sampled clean across four or five different

(Testimony of P. A. Stevens.)

streaks for the three feet across; I cut a trench clear across there at three or four different points in the three feet. I took my sample three feet wide across the underlying,—which comprised the three feet underlying the hanging-wall of that lead that has been opened up by Mr. Kemper since I last visited that cross-cut. I measured up three feet from the bottom and I took the sample across it at four different points in that three feet up and down; four different points with respect to elevation; I took the sample the same as I would take it myself, but not having time to go to work and pick down the four or six inches of the whole face of the ore and take it out and cut it down, I took it at those four different points clear across, so as to give the average of the ore in that streak; south of that three foot streak I sampled there was ledge matter; it was partly a [1358] granite ledge,—the largest part of it, silicate of copper through it; the vein in the north cross-cut, comprising all, was ten feet, all one vein; the center of that vein was not as good,—not shipping ore, and not of as good a character of ore as the hanging-wall and the footwall of it. No. 6 was a streak two feet farther south in that north cross-cut; that was the old part of the last cross-cut; when I was in there before Mr. Kemper done this new work of cross-cutting north; I took that sample the two feet, identically the same as I took the sample of the three feet of the hanging-wall of this lead; I started from one side of the streak and shaved a streak off clear across the streak, at three or four different

(Testimony of P. A. Stevens.)

points, for three feet high. I took sample No. 7 in tunnel 31; I started taking it thirty feet east of the north cross-cut, and that brought me right to the end of the fault that lies with a showing in that tunnel. I took the sample west of the fault. I went in the tunnel a distance of thirty feet; that is at a point where the tunnel hits the lead; it cuts off a part of the lead there and runs along and exposes about two feet of the ore in the north side of that tunnel; running east all the ways along for a distance of about thirty feet, I started to take sample No. 7; I took an average of the ore that lies in the north side of the bottom of the tunnel, and it also stands up and down practically the entire side of that tunnel, on the north side, for a distance of thirty feet; I took an average of that ore along the bottom and along the side, and at one point within, I should judge, of eight or ten feet of the fault, or where I stopped taking the sample, there is a hole off out there, and I gouged it and picked it out more with my sampling pick to a distance of about fifteen inches in that [1359] wall, and that went in with my sample also, which was all ore. And that is the way I took No. 7 sample, as it is shown. The vein was exposed in the bottom of the tunnel two feet wide, along the north side of the tunnel; I did not have to clean off the bottom; it stands up prominently above the bottom, where the drift runs in and intersects the lead; I sampled it along the bottom for thirty feet. I sampled at three points at the bottom where the ore was exposed. The first point was a distance of, I should judge,

(Testimony of P. A. Stevens.)

about six feet,—five or six feet,—as it lies where the tunnel intersects the lead at that point. The ore lies there possibly two feet higher than the bottom of the tunnel, and slopes down gradually, and would be for a distance of about six feet before the ore is down level with the bottom of the tunnel, and I sampled lengthways of that six feet, which would be along the footwall side of the vein. It does not disappear in the side of the tunnel; it shows in the side of the tunnel, and it shows in the back; when I took that thirty feet I was at what shows a fault, where the lead is faulted or thrown; on the northeasterly side, going toward the face of the lead, the hanging-wall shows, of that fault to the breast of the tunnel; it lies in a small opening that is made,—or cross-cut that is made in the north side of that tunnel, in about half the ways, from this fault to the breast; in my opinion the vein by that fault was thrown to the south; I could see the vein after I left that fault. I don't know what Mr. Barker testified about it. The hanging-wall, in my opinion, lies about half-ways between the fault and the breast of the tunnel; the hanging-wall then crosses the tunnel and shows very distinctly and plainly in the south side of the tunnel, almost at the back,—a little back from the face, and [1360] in the southeast corner, and dips down in the face. The cross-cut or small opening that I am alluding to in the north side of that tunnel is just about twenty feet back from the breast of the tunnel, on the north side. Referring to Complainant's Exhibit 17, I have reference to this

(Testimony of P. A. Stevens.)

little gouge on the north near the face of the tunnel as the place where I saw the hanging-wall appear, and that in my opinion was the wall of a vein and not a fault; it shows a definite hanging-wall running easterly and westerly right through. Sample No. 8 was taken in that little gouge on the north, back from the face of the tunnel, and also in the tunnel, towards the face, underlaying the hanging-wall. The streak I sampled from shows in the southeast corner a block of ore there,—a kind of a raise,—kind of runs back,—the tunnel is kind of slanting there at the face, and it is possibly a foot,—fifteen inches wide. In taking sample 8 I took the sample clean across what shows in the face; the streak in that small cross-cut was possibly eight or ten inches thick; the granite hanging-wall lay to the north side of it, and on the south ledge granite; we find it in a lot of that country up there. Sample No. 9 in the Hornet tunnel, was the first five feet going south from the Hornet tunnel on the east side of the upper cross-cut, continuously two feet up from the bottom; I sampled a trench clean through; I followed a trench that was made by the defendants, as Mr. Mason told me, as he was holding the candle and the sack; I practically followed in their foot marks, that is, wherever possible—wherever they were visible, and where they were not visible—that was in very few places; at points I saw a trench; I was just about on a level in places, and Mr. Mason held the sack for me; I just cut a small trench through there so as to get a sample of the [1361] rock; it might be an inch at points

(Testimony of P. A. Stevens.)

and two inches at other points, but it depends on how your trench sprawled out; I had a sampling pick. I did not cross any of the streaks of chrysocolla or encounter any cuprite in taking that sample, that I know of, possibly some green stains that were a little more prominent than the average of the rock; I don't know what the rock is composed that I took this sample from, but it is not quite high enough grade to be commercial ore at the present price of copper, but I have seen the day when it was commercial ore; I cannot state what it was composed of. I took sample No. 10 from the end of No. 9, going on south, and took it in the same way, cut a little trench, Mr. Mason holding the sack; I believe that at some points there was a trench very discernible. There was no chrysocolla that I noticed, and there might possibly, at one or two places, have been a stain of cuprites but I don't remember them. Chrysocolla is nothing but a water sediment, deposited from solutions; I could not say that this green staining of the rocks was deposited from solutions, but I would not say it was chrysocolla, neither black nor green, nor copper wax. No. 11 was a continuation of No. 10, taken in the same way; that comprised the distance from the Hornet tunnel to the Gulf shaft, the entire distance, which is sixteen feet, and I believe there was a trench at some points; there is a trench there at points. I did not encounter any streaks of chrysocolla or any cuprite in taking sample No. 11, any more than the rest of the samples. I was not here when Mr. Lin-

(Testimony of P. A. Stevens.)

forth testified; the material through which I took sample No. 11 is all ledge matter; there is bound to be a certain amount of granite in that, possibly more so than would be in some leads that distance under bedrock—that is, they are close to the [1362] apex of bedrock—to the wash. At the point where I ended No. 11 I crossed over to the west side of the upper cross-cut, and then proceeded from that point five feet southerly towards the Hornet shaft, and took sample No. 12 the same as I did the former samples; I noticed a channel there quite frequently as I was sampling across. No. 13 was the last five feet on the west side of the upper cross-cut to the Hornet shaft, and I kept two feet above the bottom in taking all of these samples in the upper cross-cut; I cut a continuous trench and missed nothing. No. 14 was in the Hornet shaft, the north side, and the level of No. 13, and along the north and east side of the shaft; that cross-cut fills very little of the north side of the shaft; I took all of the north side that there was. The north side of the shaft at that point opposite sample No. 13 would reach the west side of the cross-cut two feet above the level of the cross-cut, a little bit west of the corner of the shaft, or the east end of the shaft; the distance there, though, I should judge, is about four feet across the north side of the Hornet Discovery shaft, of which I sampled on a level with where I took the samples from the cross-cut. I started to take sample 14 on the same side I ended with No. 13—turned right to the right; I was on the west side

(Testimony of P. A. Stevens.)

of the cross-cut, coming in here (indicating on map), and I started from that corner and run right along west and sampled it on the north side of the shaft; I had to turn and run west on the north side of the shaft, or in a westerly direction, to take the sample. Then I came back and sampled on the same level, the east end of the shaft, which was much narrower than the west side. I took a continuous sample across the north side and across the east end—I cut a trench across, taking everything in the way as I proceeded, [1363] missing nothing, and that was about two feet above the level of the cross-cut; there might have been some small indications of cuprite in there, as it showed much better there than it did in the cross-cut; I could not say whether I encountered any in taking that sample; I was not paying particular attention to what I was taking; I was taking an average sample at that level; all I took of sample 14 was one continuous streak along the north side of the shaft and one continuous streak along the east side of the shaft, but I cannot say how near to bedrock, as I never measured the bedrock in the Hornet Discovery shaft, but there has been a whole lot of fill—or that shaft was filled, from the surface caving in—and the south side of that shaft—it is impossible to say where the bedrock is. Half ways between the Hornet Discovery shaft and the Mullins tunnel the bedrock is just exactly at the top of the timbers. My sample 14 was not taken close to the top of the bedrock; it would not have been within some four or five feet and may be more of

(Testimony of P. A. Stevens.)

the bedrock. I took 14 on a level with 13, and 13 was two feet above the floor of the upper cross-cut. I should judge it is between four and five feet, possibly more, possibly less, from the point in the Hornet Discovery shaft two feet above the floor of the upper cross-cut, from the top of bedrock, in other words, the top of bedrock in the Hornet Discovery shaft must be six or seven feet above the floor of the upper cross-cut. I dug a trench clear around those three sides of the Hornet Discovery shaft in taking sample 15; I might have encountered streaks of cuprite or chrysocolla in taking that sample; I took an average of that streak; I followed in a very noticeable trench that had already been dug in it, several inches wide, and Mr. Mason was standing on the ladder [1364] holding the sack for me. In the lower cross-cut I took sample No. 16, on the west side of it, for twenty-five feet, commencing at the shaft, two feet above the bottom; we took it all in one sample; the distance, I should judge, is about twenty-five feet, or very close to it. I believe at possibly a few points there were indications of a trench there where samples had been taken, about at that distance, but I cannot say positively that I saw any down there. No. 17 was from the hanging-wall of the drift below the Hornet tunnel, which fault, with reference to the lower cross-cut, was at about the point where it intersected the Hornet vein, in the south side of the cross-cut, or the southeast corner of the cross-cut; it is just about at that point where the cross-cut turns and hits the drift, and I

(Testimony of P. A. Stevens.)

commenced with that fault and sampled for twenty feet east, and included the material in the fault for about one foot as far as I could pick it on the fault wall; there is a strata in there of possibly five or six inches; I did not pay much attention to what was in the fault crevice—just made it my object to sample the ore that showed in that, what I believe has been called the hanging-wall; I picked in the west side of that fault and then sampled, and sampled out to the face. I just went here and there all along and all over it, took what I considered would be an average sample, both up and down and lengthways, and at the east end I dug into the wall a ways; I pulled up the ore there for possibly eight or ten inches, and took some of that ore, that ledge in there across that end, where I pulled it off; Mr. Mason was holding the candle by me, as there was not room enough to get in there side by each, as the fellow says; I marked those samples, kept them in my possession, kept them in my house until the next morning, [1365] brought them down town and delivered them to Mr. Hocking, the assayer, and those are the ones he introduced here and gave his assay certificate for.

By General NOLAN.—That is all our testimony.

By the EXAMINER.—The defendants rest.

(Witness signed testimony before examiner April 9, 1912.)

[1366] By Mr. SHELTON.—At this time the complainant will move to strike out all of the testimony of the witness White relating to the Hidden

Creek claims and the so-called copy of the report of Mr. Winchell concerning the same, for the reason that the same is not surrebuttal testimony, and for the further reason that the same is incompetent and immaterial for the reason that the loss or destruction of the original of such report has not been proven, and further for the reason that Mr. Winchell himself gave no testimony concerning the Hidden Creek properties, and the report in itself is in no way a contradiction of any statement made by Mr. Winchell.

Complainant also moves to strike out the testimony of the witness White concerning the Bonanza claims and the alleged copy of the report of Mr. Winchell concerning the same, for the reason that the same is not proper surrebuttal testimony, and for the further reason that it is incompetent, the loss or destruction of the original of such report not having been proven, and for the further reason that Mr. White, in his testimony, does not undertake to state that he has any knowledge whatever of any underground development or any deposits of ore beneath the surface of the Bonanza claim.

The complainant also moves to strike out all of the other so-called surrebuttal testimony, for the reason that it is not proper surrebuttal testimony at all, and, if admissible at all, would be admissible purely as a part of the defendants' case in chief, and this being a hearing or a taking of testimony under an order of the Court heretofore made fixing the time within which the defendants could introduce testimony in

(Testimony of Chauncey L. Berrien.)

support of its defense, and such time having expired, such testimony could not be considered by the Court without a further order of the Court allowing it to be taken.

[1367] Complainant's Case in Reply.

**[Testimony of Chauncey L. Berrien, for Plaintiff
(Recalled).]**

CHAUNCEY L. BERRIEN, heretofore duly called and sworn as a witness on behalf of the complainant, being recalled, testified as follows:

Direct Examination.

(By Judge BOURQUIN.)

The WITNESS.—I have heretofore testified in this case. I visited the shaft referred to here as shaft 21 this morning. Since I testified before there has been a cross-cut run directly south, or due south from the bottom of shaft No. 21 in which the planes of the Continental Fault, before described, are showing, and along which this cross-cut runs; they pass through and along the east side of the cross-cut,—the fault planes of the Continental fault pass through. On the west side of this cross-cut the ground is shown in its same unaltered state, since the bottom has been dug about a foot; this rock is aplite. The cleavage planes in this aplite are dipping about thirty degrees north. On either side of this cross-cut and the sides of the No. 21 shaft small channels have been along small cracks in the aplite, which have been stained with iron oxide. The cracks in the aplite that the channels have been cut along are the planes in the

(Testimony of Chauncey L. Berrien.)

aplite in which have been deposited iron oxide. They are no more than a half an inch or an inch *with*, similar to many other occurrences in aplite or granite in the Butte District. They may be termed joint planes; they are the natural cleavage planes due to the formation of the erosion,—the breaking up of the aplite, which weathers in that way. [1368] These later workings from No. 21 shaft have disclosed no more showing of anything which might be termed a vein. I noticed that this channeling, especially in the bottom of the shaft, or the walls of this shaft, can be followed from one side down across the bottom to the other, and the course of this channeling was north forty-five east, in the shaft; I do not believe there is anything else of importance there. Going south along the fault planes, they pass through the east side of this south cross-cut. The shaft itself is about north twenty degrees west, in its longer dimensions, and the cross-cut leaving the southerly side of the shaft proceeds due south. I saw no walls that the witnesses testified to yesterday as a pronounced wall about seven or eight feet southerly from the shaft 21; I saw an excavation or a channeling easterly and westerly in course, which was dug out of the material in the walls of this cross-cut; the only appearance of direction was the cut itself; the material showed no course or structure, other than decomposed country rock along and in the Continental fault; the cross-cut south from shaft 21 was run in aplite, and material crushed up in the fault, and in the face of this southerly cross-cut there was country

(Testimony of Chauncey L. Berrien.)

rock, ground up by the faulting, and more or less altered. The entire length of this southerly cross-cut was in fault material, and the eastern half of it,—eastern side,—that is a line,—north and south line running through the cross-cut would show fault material and fault walls on the east side, while on the west side there is less altered aplite. In the cross-cut going south, slickensides showed along the fault wall,—to the center and on the east side; the east side is the only place they showed. I went down the Olivia discovery shaft, which has been dug out since I was out there the last time.

[1369] Q. Well, describe what you observed there.

A. It is a shaft about ten feet deep, four feet by four.

By General NOLAN.—Just a moment. We object to that as not rebuttal. Object to it for the reason that it is taken beyond the time prescribed within which testimony can be taken. I want the record to show that I have not any objection at all to evidence being taken in rebuttal of the evidence as to the new conditions about which no testimony was heretofore given. The witness has testified, or, if he did not testify about the Olivia before, the record was in such a shape so that evidence was competent in reference to it when he so testified.

By Judge BOURQUIN.—Well, we have no purpose in bringing in anything but what might be properly termed rebuttal of the surrebuttal offered by defendants. Incidentally, however, it might involve a

(Testimony of Chauncey L. Berrien.)

description of the Olivia shaft, which, of course, might have been heretofore properly introduced in our case in chief. I think that it was heretofore agreed that after the close of your surrebuttal that we could have some little time for rebuttal of that.

By General NOLAN.—Yes, and I have not any objection at all to that drift, and also in reference to the deep shaft. That undoubtedly is proper, and I do not object to evidence in reference to it.

The WITNESS.—The upper four or five feet is made in the wash. The lower portion, probably six feet, is in granite. Westerly from the bottom of the Olivia discovery a working has been made which has just holed into shaft No. 1. This working is about eight feet long; it is entirely in granite, and on the south and upper portion of this connection there is some iron oxide through the granite, due, undoubtedly, to its proximity [1370] to the wash, which is eight feet deep in No. 1 and four feet deep in the Olivia discovery, showing an inclination which would bring the back of this working within a foot or two, at the most, of the line of wash and bed-rock. There are no signs of vein walls or of vein material in this connection between the Olivia and shaft No. 1; there were joint planes or fractures stained with iron oxide in the new workings from the Olivia to shaft No. 1, but there was no green stain of copper through the workings. The opening from this new working into shaft No. 1 was about six or eight inches; it was not large enough for a man to pass through.

(Testimony of Chauncey L. Berrien.)

Cross-examination.

(By General NOLAN.)

The WITNESS.—The disclosures in the cross-cut in the deep shaft have not modified the views I heretofore expressed in reference to no vein running east and west and fault fissures running north and south; there were not any fault planes disclosed in the shafts running east and west. I testified that the planes that were visible were north and south, but I did not tell you at that time that in the aplite there were joint planes whose direction was east and west; there are no joint planes visible in the shaft whose course is east and west, nor in the cross-cut; there are not any cracks in the aplite whose course is east and west; they are north forty-five east,—that would be half from a line due north and south; the cross-cut runs due south; they do not run across the cross-cut; their dip is thirty degrees north; the correct dip is generally at right angles to the course of a striation or line. [1371] In the case of a line or a break, the dip is at right angles to the strike. The strike of the vein is north forty-five degrees east, which is about like that (indicating),—the strike of it, mind you,—and the dip is down this way (indicating). Now, the strike of it,—a line in that strike or dip, is at right angles to that; the dip is taken at right angles. I give it at right angles to the strike, in the plane of it. If you are talking about the plane of it; the plane of the strike of these fractures,—it is not at right angles to the plane of the dip, but the dip is at right angles to the strike. The dip is the course

(Testimony of Chauncey L. Berrien.)

of the break as it extends into the earth; that is what I call a dip; it is the inclination from the horizontal; the plane of that is not at right angles to its strike, but dips are taken at right angles to a strike.

Q. Why, I am talking about the appearance of the circumstances that present themselves there. I am not going into the field of geology generally. I am simply asking you in reference to the condition,—in reference to that particular break that shows itself in that cross-cut.

By Judge BOURQUIN.—We object, for the reason that, while the dip is taken at right angles to the strike, yet the dip may have any variation and does not depend at all upon the degree of the strike. The question seems to me an incomprehensible one, and the objection is made on that score,—incompetent.

Q. Now, you say that in the case of this fault, this cross-cut is in the fault, or a portion of it,—the eastern portion, in the fault fissure? A. Yes.

[1372] The WITNESS.—The fault is dipping to the east; you see two fault walls and a fault zone in the cross-cut running north and south; the footwall of this fault fissure, which occupies the eastern portion of the cross-cut in its course north and south, is visible there; you can follow it from the northeast corner of the shaft, and passing along through the shaft and through the east side of the south cross-cut, and the western wall of the cross-cut is in aplite,—altered country rock, altered through erosion and fault movement; the western boundary of the cross-cut is in the fault zone, evidently. It cannot be de-

(Testimony of Chauncey L. Berrien.)

terminated just now whether there may be an indefinite fault wall still farther west of that; there are some joint planes in the aplite there with a course north forty-five east; northerly and southerly is where you have a deviation from the direct north and south. There is some cutting in the south cross-cut which is almost east and west, but it did not follow anything definite that I could see; it did not follow any natural line of cleavage; there was not any natural line of cleavage visible where this cutting was done, but there was where the cutting was done; you could see the course of the fractures in the aplite on the west side in this cut,—the west side of this south cross-cut, and their course was about north forty-five east, which I would call easterly and westerly, and you could also call that northerly and southerly, but I would not; I would give it a definite course.

Redirect Examination.

(By Judge BOURQUIN.)

Q. Now, Mr. Berrien, you say you saw some fracture lines adjacent to the cuts in the cross-cut which, of themselves, you say, followed no definite line of cleavage?

[1373] By General NOLAN.—Object to that as not redirect. He has testified about that, Judge.

By Judge BOURQUIN.—I had not quite finished my question, Colonel.

Q. How do you mean that they were adjacent to those lines that were cut?

A. I picked down into the bottom of this cut on the west side of the cross-cut, and the aplite would

(Testimony of Chauncey L. Berrien.)

come off in definite pieces, showing the direction of the cleavage of the aplite.

Q. And what was its direction with reference to the direction of the cuts?

By General NOLAN.—To that we object likewise as not redirect examination.

A. It was practically the same as the channeling across the shaft.

The WITNESS.—It was practically the same as the direction of the cuts themselves in the shaft; you take the dip of the fracture of a vein at right angles to the strike, but the dip thus taken is not controlled at all by the strike, in reference to the number of degrees the dip has; it can be anything from zero to ninety degrees.

**[Testimony of Frank A. Linforth, for Plaintiff
(Recalled).]**

[1374] FRANK A. LINFORTH, heretofore duly called and sworn as a witness on behalf of the complainant, being recalled, testified as follows:

Direct Examination.

(By Mr. SHELTON.)

The WITNESS.—I made a further examination of shaft No. 21 since I testified before this morning. From the bottom of shaft 21 a tunnel has been run southerly for a distance of about twelve or fifteen feet, but I should call it a drift—

By General NOLAN.—We object to that as not surrebuttal. If there is any evidence that is contradictory,—I do not suppose there is any question about the running of that drift,—we are simply getting

(Testimony of Frank A. Linforth.)

into this record a lot of stuff that has not any place there. Now, if there is any evidence that he desires to give contradictory of ours, why, it is proper surrebuttal.

By Mr. SHELTON.—You can make your objection and we will go ahead.

By General NOLAN.—Well, I shall object to it, and, of course, if we are going to go into this, I shall object on the ground that there is not any authority for the taking of this evidence. If there is any evidence at all that they desire to use in contradiction of our evidence, I have not any objections to it, but there is not any question about the running of this drift. This is merely corroborative of it. If there is evidence contradictory of it, let us have it. Now, if there is any evidence about lines or courses or anything of that kind, let us get to it.

The EXAMINER.—Well, it seems to be simply preliminary.

[1375] By Mr. SHELTON.—You say that none of the testimony that we are now taking is testimony in reply,—is to be considered as offered at all. If our motion to strike out the so-called surrebuttal testimony on the part of the defendants is sustained but the question now put to the witness is merely to define the place about which he is to be questioned. We have to ask him, of course, what ground he made an examination of before we can ask him what he saw there.

By General NOLAN.—Why, no, he is telling us about the running of a cross-cut. That is not contra-

(Testimony of Frank A. Linforth.)

dictory of anything we introduced. This is simply listening to a lecture.

A. This tunnel is what I should call a drift on the branches of the Continental fault, found and testified to heretofore, and I did not find the course of that fault on both sides of the shaft and on both sides of this new work. There have been cut some channels which make certain exposures, one of them, notably, at a point close to the bottom and near the south face of this new drift, shows the only exposure of rock which can be classified, and it is aplite, the joint planes of which can be seen, and which dip northerly about thirty to thirty-five degrees. Now, in the sides of the shaft there have been cuts made on similar joint planes,—similar to this extent. The bottom of that shaft is in material so altered that it is difficult to say what the rock species is, but these joint planes—

By General NOLAN.—We object to that as not responsive to the question. That is not the way of presenting rebuttal. We simply have a lecture here. I submit, if the Court please, if there is any evidence contradictory of our evidence, it ought to be elicited by question and answer. This thing of putting a [1376] geologist on the stand and giving a lecture at this stage of the proceedings is not a practical way of submitting this rebuttal evidence. Now, there is not any contradiction about this cross-cut. That is not rebuttal. There is not any contradiction yet in any testimony that he has given. The evidence that he gives in reference to those cuts is simply corroborative. Now, if there is any evidence contradictory

(Testimony of Frank A. Linforth.)

of our evidence, that is rebuttal evidence. This thing of putting a witness on the stand and going through a course of sprouts, without any evidence at all, to be confined within certain limits. That is not any way of conducting the examination of a witness. I cannot tell whether it is responsive to a question or not. I could intelligently object if questions were put.

By the EXAMINER.—Well, I think counsel can pursue their own course in the matter of introducing evidence. This certainly refers to the new cuts made on the ground.

A. These channels that have been cut in the sides of the shaft and in the sides of the drift may be seen directly opposite each other across the drift, so that a line between them might be east and west, but if we take one of them and note the exposure in it and follow it without removing your finger from it to the cut to which it leads to on the opposite side, the strike or course of that seam is northeast, so that there are no east and west fissures, breaks or geological phenomena in that working. The strike of the joint planes or cracks in the aplite I have been speaking about is north forty-five east, or thereabouts. In going south in this tunnel I find the wall of the Continental fault, heretofore testified to,—the one which appeared on the east side of the shaft, and it can now be seen along the east side of the drift and close [1377] to the face; the dip of the Continental fault shown in the cross-cut to the south is very nearly vertical, within a degree or two. This cross-cut at the east side is the typical fault material; at the west side, it is the less altered aplite to which I referred, and

(Testimony of Frank A. Linforth.)

which showed the dip and strike; I should call it a drift on the Continental fault; I use the term "drift" to indicate an opening made in the direction of the geological formation in which it is being drawn; it may be a vein or a fault; the east side shows the typical fault material; the west side shows the aplite whose course and dip I have referred to. In the face of the drift, on the east side, the fault material is visible,—the east half of the face. The slickensides observed are those observed in the shaft itself, at my original examination. The exposures in the channels are all iron oxide mud, which disappears as soon as you get away from the top of the wash and has no slickensides,—at the top of the bedrock instead of the top of the wash, I meant to say. There is no mineralization in any of these cracks or joint planes of the aplite; there is an infiltration of a little mud, made of the iron oxide, and is extremely local; it does not carry mineral. The mud is partially composed of iron oxide. I presume by "mineral" you meant what we referred to heretofore. I have made an examination of the new work connecting the Olivia discovery with shaft No. 1, and there is no indication of a vein whatever. The exposures in the cross-cut are clearly granite, very plain. At the south side of the Olivia shaft a more silicious phase of the granite appears, in which short cracks occur, cracks of very limited extent, not connected with vein formation or structure in any way, and the usual iron oxide filling found in cracks in the surface granite anywhere, is found there. [1378] The green stain is absolutely

(Testimony of Frank A. Linforth.)

lacking in that particular locality, and the green stain is lacking in shaft 1 and the opening between shaft 1 and the Olivia. The opening connecting the cross-cut with shaft No. 1 is an irregular hole, not to exceed eight inches across.

Cross-examination.

(By General NOLAN.)

The WITNESS.—There is no evidence of a lead in the cross-cut extending from the No. 1 shaft to the Olivia shaft, and there is no evidence that I could discover of any hanging-wall, nor any wall at all; there is only such dividing line there as comes from the more silicious phase of the granite and the fresh granite, which is irregular, of short length and indefinite. The joint planes pass out of the south side of the Olivia, so that granite appears in both sides of the connection, close to the No. 1 shaft. In the case of the cross-cut from the deep shaft, if you speak of a joint plane, assuming that it is a line of cleavage in the aplite or in the granite, if it has a northerly and southerly course, it could not have an easterly and westerly course in the same distance; that would be impossible. I noticed joint planes at the end of the drift, and their course is northeasterly a few degrees from north,—north forty-five east. None of the cuts indicate an easterly and westerly course in themselves; I say that a line from a cut on one side, drawn to a cut on the other side might be an east and west line, but following around the exposure made by the cut, it will miss the cut on the other side, which exposes the same joint plane; the course of that is

(Testimony of Frank A. Linforth.)

northeasterly. [1379] The joint planes have a northeasterly course where they can be seen. They are seen in the fresh rock at but one point, and are visible by means of the infiltration mentioned in these other points; they can be seen, and they should be traced from point to point without removing the finger from the phenomena in question; your examination is more complete if you trace absolutely from point to point without ever losing the connection, but without using the finger you can see the line with the naked eye; by simply depending upon the eye, there is likely to be a deception unless you trace the line with the finger, for the purpose of determining its actual course. The footwall of this fault fissure that occupies the eastern portion of the cross-cut has a northerly and southerly strike, and may be seen there.

Redirect Examination.

(By Mr. SHELTON.)

The WITNESS.—When a vein or a fault is vertical, the foot or the hanging-wall is an indeterminate term and, furthermore, the fault is composed of so many fissures that you would refer to the footwall of each separate fissure, and not to the footwall of the fault, which is another indeterminate quantity.

(Signed by witness before examiner, April 10, 1912.)

[**Testimony of Simeon V. Kemper, for Plaintiff
(Recalled).**]

[1380] SIMEON V. KEMPER, heretofore duly called and sworn as a witness on behalf of the complainant, being recalled, testified as follows:

Direct Examination.

(By Judge BOURQUIN.)

The WITNESS.—I have visited and seen the new work done in shaft 21, and between the Olivia and shaft No. 1. The drift southerly from shaft 21, which has been run since the main part of this hearing, contains about the same, or exhibits about the same conditions that the shaft itself did in the bed-rock; in that southerly drift, the fault plane, or one line of movement in particular, is very well defined,—that a line that I spoke of before is continued southerly in this drift the whole length of it; it shows in the face of the drift, there being clay or finer ground up material on the east of it than there is on the west. I don't know what the material is on the west side of that drift to the south; it is harder than it is on the east, and it seems to be less altered material. I did not take the course of any fractures running across that southerly drift, but there are some, which are evidenced by the red stain, or iron oxide that is in them; they appear more on the west side than they do on the east; they do not run directly at right angles to the drift; I do not know what their course is; Mr. Berrien and Mr. Linforth were with me this morning, but I did not see them taking the course of that.

Q. What about the channeling that has been done

(Testimony of Simeon V. Kemper.)

in that drift in reference to the exposure in them?

A. Well, there has been some channeling,—pick work,—done [1381] there, which appears to be a bluff, which appears to endeavor to lead an observer to think—

By General NOLAN.—Just a moment. Move to strike that out as not responsive to the question, and also as expressing an opinion in reference to a matter that is beyond his province.

Q. Just tell us what this channel exposes, if anything.

A. There are channels both on the east side and the west side of that drift. Some of them expose this red material, that lay in cracks, and some expose nothing.

The WITNESS.—Some of them have cracks showing in them, and some have not. Some of the cracks are outside of these channels. They may have been run along some of these cleavage planes, and some of them are not. In the connection between shaft 1 and the Olivia discovery I observed about the same conditions that there is in the Olivia discovery, or in shaft No. 1; that connection is run in granite; there is no vein or any wall of a vein, nothing showing to indicate a vein; there is considerable stain in that connection in spots, red stain,—looks like it might be iron stain; there is absolutely no green stain visible there.

Cross-examination.

(By General NOLAN.)

The WITNESS.—I made an examination of the new workings, the cross-cut, but not the connection between the Olivia and the tunnel, until this morning,

(Testimony of Simeon V. Kemper.)

in shaft 21. In the case of the cross-cut from shaft 21 there is one well-defined line running, through the entire distance north and south, but in places it disappears in places; that is apparent in the shaft and where the drift south leaves the shaft, it leaves this line I speak [1382] of, hidden in the east side, and then it appears again further on in the drift; one of those channels is right in the shaft; on the east side there is a cutting into the material, and I do not observe any difference between the cut and the material adjacent to the cut. That is all about the same kind of material,—country rock; no evidence of any lead at all; there was a great deal of granite in there; there is some little aplite showing in there, what they call aplite; I do not know what it is; there is no continuous line of demarcation visible between the aplite and the granite; there are places you can distinguish between the aplite and fresh granite; and it runs rather easterly and westerly.

The following are copies, in substance, of exhibits introduced:

[Complainant's Exhibit No. 1.]

[1383] (No. 443. In Equity. Compl. Exhibit No. 1. Oliver T. Crane, Examiner.)

Article No. 27117. (Domestic.) No. 17061.

UNITED STATES OF AMERICA.

STATE OF WASHINGTON.

OFFICE OF THE SECRETARY OF STATE.

I, I. M. HOWELL, Secretary of State of the State of Washington, do hereby certify that ARTICLES OF INCORPORATION of the WASHINGTON-

BUTTE MINING COMPANY (Spokane) were, on the 2 day of February, A. D. 1910, at 11:24 o'clock A. M., filed for record in this office and recorded in book 85, page 322, Domestic Corporations.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Washington. Done at the Capitol at Olympia, Mch. 17, A. D., 1910.

I. M. HOWELL,
Secretary of State.

[The Seal of the State of Washington]

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

[Complainant's Exhibit No. 2.]

[1384] (No. 443. In Equity. Compl. Exhibit No.
2. Oliver T. Crane, Examiner.)

Article No. 27117. Certified Copy No. 4251.

UNITED STATES OF AMERICA.

THE STATE OF WASHINGTON.

DEPARTMENT OF STATE.

TO ALL TO WHOM THESE PRESENTS SHALL
COME.

I, I. M. Howell, Secretary of State of the State of Washington, and custodian of the Seal of said State, do hereby certify that I have carefully compared the annexed copy of the ARTICLES OF INCORPORATION OF THE "WASHINGTON-BUTTE MINING COMPANY" (of Spokane, Wash.), with the original copy of said original Articles of Incorporation now on file in this office, and find the same to be a full, true and correct copy thereof, and of the whole of said original, together with all official endorsements

thereon. And I further certify that the said original Articles appear to have been duly and regularly filed in this office, according to law, and that the same are of a genuine, valid and subsisting character, and that this certificate is in due form and by the proper officer having the legal custody of said original and the requisite official knowledge relative thereto.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the State of Washington. Done at the Capitol at Olympia this 14th day of Feby. A. D. 1910.

I. M. HOWELL,
Secretary of State.

By _____,
Assistant Secretary of State.

[The Seal of the State of Washington, 1889.]

[1385] No. 27117.

ARTICLES OF INCORPORATION
OF

WASHINGTON-BUTTE MINING COMPANY:

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, E. S. Shields, S. V. Kemper, W. A. Kemper and A. L. Palmer, citizens of the United States, and residing at Butte, Silver Bow County, Montana, and A. W. Witherspoon, a citizen of the United States, and residing at Spokane, Spokane County, Washington, have associated ourselves together for the purpose of forming, and do hereby form, a body corporate, under the laws of the State of Washington, and for such purpose do hereby certify to and subscribe written articles of incorporation, as follows, to wit:

I.

The name of the corporation hereby formed shall be and is "WASHINGTON-BUTTE MINING COMPANY."

II.

The purposes for which this corporation is formed are as follows, to wit:

1. To prospect for, to locate, and acquire by location, purchase or other lawful means, mines and mining claims, and to buy, sell, deal in, lease, own, operate and develop mines and mining claims, and generally to carry on a quartz and placer mining business.

2. To carry on the business of mining and smelting and the extracting of minerals from ore and mineral bearing rock, and to transact generally the business of mining, smelting and the reduction of ores and minerals.

3. To control, own, operate, buy, lease, bond or otherwise acquire mines and mining claims, and lands and real estate, and put all such property upon the market in such way and in such manner as may be most advantageous to the corporation, and to borrow money for the purposes of the corporation, and to execute and deliver the [1386] notes or other obligations of the corporation therefor, and for the purpose of securing any loan or loans procured on behalf of the company, and for the purchase, operation or development of any such property or the operation of any such mine or mines, or manufacturing plants, to bond such property or any part thereof, and to offer such bonds for sale, and generally to do all things

necessary or proper in the matter of carrying on the business of the corporation under these articles.

4. To carry on and transact a general logging, lumber, sawmill and real estate business in the states of Washington, Idaho and Montana, and elsewhere, and to acquire by location, purchase or other lawful means, timber and timber lands, and to build, construct, own and operate, buy and sell, sawmills, planing mills and such other manufacturing plants as may be necessary or proper in carrying on a general lumber and sawmill business under these articles; to locate, purchase, own and use millsites and water rights in the states of Washington, Idaho, Montana and elsewhere, and to build, own and control, buy and sell, such millsites and water rights, ditches and flumes, as may be necessary and proper in connection with the use of said water for power, irrigation and other useful purposes; to buy, sell, mortgage, rent trade in or otherwise dispose of any of the property acquired as aforesaid by said corporation; to conduct a general mercantile business, and to buy or otherwise acquire, and to sell or otherwise dispose of, all classes of personal property.

5. To buy, sell and deal in, own and control, corporate bonds, stocks and other securities.

III.

The principal place of business of this corporation shall be the city of Spokane, Spokane County, Washington.

IV.

This corporation shall exist for a period of fifty years.

[1387] V.

The directors of the corporation hereby formed shall consist of five persons, and the names and *resides* of those appointed for the first six months, and until their successors are elected and qualified, are as follows, to wit:

A. W. Witherspoon, residing at Spokane, Spokane County, Washington.

E. S. Shields, residing at Butte, Silver Bow County, Montana.

S. V. Kemper, residing at Butte, Silver Bow County, Montana.

W. A. Kemper, residing at Butte, Silver Bow County, Montana.

A. L. Palmer, residing at Butte, Silver Bow County, Montana.

VI.

The amount of capital stock of this corporation shall be Two Hundred Thousand (\$200,000.00) Dollars, consisting of twenty thousand (20,000) shares of the par value of Ten (\$10.00) Dollars per share.

VII.

Of the capital stock of the corporation the following has been subscribed:

By A. W. Witherspoon,	1 share,
By W. A. Kemper,	1 share,
By S. V. Kemper,	1 share,
By A. L. Palmer,	1 share,
By E. S. Shields,	1 share,
By E. S. Shields, Trustee,	19,995 shares.

VIII.

The stock of this corporation shall be assessable.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 28th day of January, 1910.

E. S. SHIELDS. [Seal]

S. V. KEMPER. [Seal]

W. A. KEMPER. [Seal]

A. L. PALMER. [Seal]

A. W. WITHERSPOON. [Seal]

[1388] State of Montana,
County of Silver Bow,—ss.

I, L. M. Schott, a Notary Public in and for the State of Montana, do hereby certify, that on this 28th day of January, 1910, personally appeared before me, E. S. Shields, W. A. Kemper, S. V. Kemper and A. L. Palmer, to me known to be the individuals described in, and who executed the within instrument, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 28th day of January, 1910.

L. M. SCHOTT,
Notary Public for the State of Montana, Residing at
Butte.

My commission expires December 13th, 1912.

[L. M. Schott—Notarial Seal—State of Montana.]

State of Washington,
County of Spokane,—ss.

I, W. J. C. Wakefield, a Notary Public in and for the State of Washington, do hereby certify that on this 31st day of January, 1910, personally appeared

before me, A. W. Witherspoon, to me known to be the individual described in, and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 31st day of January, 1910.

W. J. C. WAKEFIELD,

Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

[W. J. C. Wakefield—Notary Public, State of Washington. Commission Expires *Mar* 28, 1913.]

[Endorsed]: Filed for Record in the Office of the Secretary of State, Feb. 2, 1910, at 11:24 A. M. Recorded Book 85, page 322, Domestic Corporations. I. M. Howell, Secretary of State.

Filed and entered Apr. 17, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy.

[Complainant's Exhibit No. 3—Notice of Placer Location.]

[1389] (No. 443. In Equity. Compl. Exhibit No. 3. Oliver T. Crane, Examiner.)

NOTICE OF PLACER LOCATION.

NOTICE IS HEREBY GIVEN that a Placer Mining Claim has been discovered at or near the point where this Notice is posted, bearing a valuable deposit of Gold and Clay and that the undersigned who are citizens of the United States or have declared their intention to become such, and are of lawful age, have on this 20th day of December, A. D. 1890, under

the provisions of Chapter VI of Title XXXII, of the Revised Statutes of the United States, and acts amendatory thereto, located a Mining Claim to be known as the Butte and Boston Placer Mine, situated about two miles east of the eastern limits of the City of Butte, in unorganized Mining District, Silver Bow County, State of Montana, the said claim being for forty (or less) acres of surface ground, together with the water existing upon or flowing across the said claim with the right to use and appropriate all or any portion thereof in any manner deemed advisable for the most effectual development and working of the said Placer Mining Claim, and it is the intention of the locators to hold and work the said mine under the said provisions of the said Statutes, and in accordance with the Mining Laws of Montana and the local rules and customs of miners. The adjoining claims are on the north the May Yohe Placer, the Rising Sun Lode and the Copper Queen Lode, on the east the Pacific Lode Survey No. 2320, on the west the east line of Section 17, T. 3 N., R. 7 W. The boundaries and location of the said Mining Claim being more particularly described as follows, to wit:

Beginning at the $\frac{1}{4}$ Section corner on the East boundary of Section 17 in Tp. 3 N., R. 7 W., for the Northwest corner (No. 1) of this claim marked by a post set and running thence Easterly 1900 feet to the northeast corner (No. 2) of this claim, thence [1390] Southerly 700 feet to the Southwest corner of the Pacific Lode claim, Survey No. 2320, which is corner No. 3 of this claim, thence Westerly 200 feet to the Northeast corner of the Bullwhacker Lode Lot

No. 255, T. 3 N., R. 7 W., which is corner No. 4 of this claim, thence westerly along the north line of said Bullwhacker Lode 1500 feet to the northwest corner of said Bullwhacker claim, which is corner No. 5 of this claim, thence Southerly 350 feet to corner No. 9, of the Park City Placer claim, which is corner No. 6 of this claim, thence Westerly 233 feet to corner No. 10 of the Park City Placer claim, for the southwest corner (No. 7) of this claim, thence northerly along the East boundary of said section 17, T. 3 N., R. 7 W., 1320 feet more or less to the place of beginning.

Containing an area of forty acres or less, each corner being marked with a post with the number of the corner.

CHARLES F. BOOTH,
SIMEON V. KEMPER,
WILLIAM V. LAWLOR, .
Locators and Claimants.

State of Montana,

County of Silver Bow,—ss.

Simeon V. Kemper, being first duly sworn according to law, deposes and says, that he is a native-born citizen of the United States, of lawful age and one of the locators and claimants of the Placer Mining Claim mentioned and described in the foregoing Notice of Location and Claim, appearing upon the opposite page hereof, and one of the persons whose names are subscribed thereto as locators and claimants, that he has discovered Gold and Clay within the exterior boundaries of the claim above described, that he knows the contents of the said Notice and

A Statement foregoing, and that the matters and things stated therein are true.

SIMEON V. KEMPER.

Subscribed and sworn to before me this 22 day of December, A. D. [1391] 1890.

[Notarial Seal]

WM. B. SCOTT,
Notary Public.

Filed for Record Dec. 22, A. D. 1890, at 45 min. past 11 o'clock A. M. C. F. Booth, County Recorder.

Then follows certificate of County Clerk and Recorder that the foregoing is a true and correct copy, and that the original is recorded at page 24 in Book "B" of Placer Location Records of Silver Bow County, Montana.

Filed and entered Apr. 17, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy.

[Complainant's Exhibit No. 4—Bargain and Sale Deed Dated December 23, 1890—Charles F. Booth and Josephine J. Booth and Simeon V. Kemper.]

[1392] (No. 443. In Equity. Compl. Exhibit No. 4. Oliver T. Crane, Examiner.)

BARGAIN AND SALE DEED.

THIS INDENTURE, Made the 23rd day of December in the year of our Lord One Thousand Eight Hundred and Ninety between Charles F. Booth and Josephine J. Booth, his wife, of Butte City, Silver Bow County, Montana, the parties of the first part, and Simeon V. Kemper of the same place, party of the second part, Witnesseth: That the said parties of the first part, for and in consideration of the sum of One (1) Dollar, lawful money of the United States

of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns forever, all of the following described property situate, lying and being in Silver Bow County, State of Montana, and particularly bounded and described as follows, to wit: An undivided one-third $\frac{1}{3}$ interest in and to the "Butte and Boston" Placer Claim, said claim was located on the 22nd day of December, 1890, and the notice of such location is of record on page 25 of Book "B" of Placers, records of said County to which record reference is hereby made for a full and complete description of said claim.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, as usually had and enjoyed.

To have and to hold all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever.

In Witness Whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CHAS. F. BOOTH. [Seal]

JOSEPHINE J. BOOTH. [Seal]

[1393] Duly acknowledged, and recorded at page 500 of Book "S" of Deeds, Records of Silver Bow County, Montana.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

[Complainant's Exhibit No. 5—Bargain and Sale
Deed Dated January 16, 1891—William V.
Lawlor and Margaret N. Lawlor and Josephine
Lorenz.]

[1394] (No. 443. In Equity. Compl. Exhibit No.
5. Oliver T. Crane, Examiner.)

BARGAIN AND SALE DEED.

THIS INDENTURE, made the 16th day of January, in the year of our Lord one thousand eight hundred and ninety-one between William V. Lawlor and Margaret N. Lawlor his wife, of Butte City, Silver Bow County, State of Montana, parties of the first part, and Josephine Lorenz of the same place, party of the second part, WITNESSETH: That the said parties of the first part, for and in consideration of the sum of One (1.00) Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and to her heirs and assigns forever, all the following described property situate, lying and being in Silver Bow County, State of Montana, and particularly bounded and described as follows, to wit:

An undivided one-third ($\frac{1}{3}$) interest in and to the "Butte and Boston" Placer Claim, said claim was located on the 22nd day of December, 1890, and notice of such location is of record on page 25 of

Book "B" of Placers records of said County to which record reference is hereby made for a full and complete description of said claim.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, as usually had and enjoyed.

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances unto the said party of the second part, and to her heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

[1395] WILLIAM V. LAWLOR. [Seal]

MARGARET M. LAWLOR. [Seal]

Signed, sealed and delivered in the presence of
SIMEON V. KEMPER.

Duly acknowledged by the grantors, and filed for record Jany. 20th, 1891, at 45 minutes past 9 o'clock A. M.

Then follows a certificate by the County Clerk and Recorder of Silver Bow County, Montana, to the effect that the foregoing is a true copy of the original, which appears of record at page 504, of Book "S" of Deed Records of Silver Bow County, Montana.

[Complainant's Exhibit No. 6—Bargain and Sale Deed Dated July 14, 1891—Josephine Lorenz and William Lorenz and William V. Lawlor.]

[1396] (No. 443. In Equity. Compl. Exhibit No. 6. Oliver T. Crane, Examiner.)

BARGAIN AND SALE DEED.

THIS INDENTURE, Made the 14th day of July, in the year of our Lord one thousand eight hundred and ninety-one, between Josephine Lorenz and William Lorenz, her husband, of Butte City, Silver Bow County, State of Montana, parties of the first part, and William V. Lawlor of the same place, party of the second part, WITNESSETH:

That the said parties of the first part for and in consideration of the sum of 'One Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and to her heirs and assigns forever, all the following described property situate, lying and being in Silver Bow County, State of Montana, and particularly bounded and described as follows, to wit:

An undivided one-third ($\frac{1}{3}$) interest in and to the Butte and Boston Placer Claim said claim was located on the 22d day of December, 1890, and Notice of such location is of record on page 25 of Book "B" of Placer Records of said County to which record reference is hereby made for a full and complete de-

scription of said claim.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, as usually had and enjoyed.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances unto the said party of the second part and to his heirs and assigns forever.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals the day and year first above written.

[1397] JOSEPHINE M. LORENZ. [Seal]

WILLIAM LORENZ. [Seal]

Signed, sealed and delivered in the presence of
SIMEON V. KEMPER.

Duly acknowledged by the grantors, and filed for record Mch. 14th, A. D. 1892, at 45 Min. past 9 o'clock A. M.

Then follows a certificate by the county clerk and recorder of Silver Bow County, Montana, to the effect that the foregoing is a true copy of the original, which appears of record at page 249 of Book "3" of Deed Records of Silver Bow County, Montana.

[Complainant's Exhibit No. 7—Bargain and Sale Deed Dated March 14, 1882—William V. Lawlor and Margaret M. Lawlor and Simeon V. Kemper.]

[1398] (No. 443. In Equity. Compl. Exhibit No. 7. Oliver T. Crane, Examiner.)
BARGAIN AND SALE DEED.

THIS INDENTURE, Made the 14th day of

March, in the year of our Lord, one thousand eight hundred and eighty-two, between William V. Lawlor, and Margaret M. Lawlor, his wife, of Butte, Silver Bow County, Montana, parties of the first part, and Simeon V. Kemper of the same place, party of the second part, WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Twelve Thousand (\$12,000.00) Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey, unto the said party of the second part, and to his heirs and assigns forever.

All of the following described property situate, lying and being in Silver Bow County, State of Montana, and particularly bounded and described as follows to-wit: An undivided one-half ($\frac{1}{2}$) interest in and to lots three (3), and four (4) in block one (1), Lots One (1), Two (2), three (3), four (4), five (5), and seven (7), thirteen (13), fourteen (14), twenty-four (24), twenty-five (25), and twenty-six (26) in Block two (2); Lots nine (9), ten (10), eleven (11) and twelve (12), in block three (3); Lots eight (8), nine (9), and ten (10), in block four (4); Lots one (1), two (2), three (3), six (6), and seven (7) in Block five (5), of the Lawler and Kemper Addition to Butte.

Also Lots one (1), two (2), three (3) and six (6), in Block six (6), of the Emmet Addition to Butte, and all of Lot nine (9), in block two (2), in the

Lawler & Kemper Addition to Butte, according to the official surveys and plats of the said Additions, now on file in the office of the Clerk and Recorder of Silver Bow County, State of Montana.

[1399] Also all their right, title and interest, in the Belcher quartz lode mining claim, designated as Lot No. 538, T. 3 N. R. 8 W. and the Gambrinus quartz lode mining claim, Lot No. 266 T. 3 N., R. 8 W., including that portion of the surface of said Gambrinus Claim, lying east of Missoula Gulch, and lots eighteen (18), in block two (2), and lot eight (8) in block five (5) of said Lawler and Kemper Addition.

Also all their interest in Section Six (6), in T. 2 N., R. 7 W. Also an undivided one-third ($\frac{1}{3}$) interest in the Butte and Boston Placer Claim, Survey #3379, situated in the North West quarter of Section sixteen (16) T. 3 N. R. 7 W. of the Principal Meridian of Montana.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, as usually had and enjoyed.

To have and to hold all and singular the said premises together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part, have hereunto set their hands and seals, the day and year first above written.

WILLIAM V. LAWLOR. [Seal]

MARGARET M. LAWLOR. [Seal]

Duly acknowledged, and filed for record March 15, 1892.

Then follows a certificate by the County Clerk and Recorder of Silver Bow County, Montana, to the effect that the foregoing is a true copy of the original as of record at page 294 in Book "1" of Deeds, Records of Silver Bow County, Montana.

[Complainant's Exhibit No. 8—Bargain and Sale Deed Dated June 24, 1892—Simeon V. Kemper and Sallie B. Kemper and James W. Kemper.]

[1400] (No. 443. In Equity. Compl. Exhibit No. 8. Oliver T. Crane, Examiner.)

BARGAIN AND SALE DEED.

THIS INDENTURE, made the 24 day of June, in the year of our Lord, one Thousand Eight Hundred and Ninety-two, between Simeon V. Kemper and Sallie B. Kemper, his wife, of Butte, Silver Bow County, State of Montana, parties of the first part, and James W. Kemper, of the same place, the party of the second part, WITNESSETH: That the said parties of the first part for and in consideration of the sum of Five Thousand (5000.00) Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns forever, all of the following described property, situate, lying and being in Silver Bow County, State of Montana, and particularly bounded and described as follows, to wit:

The undivided one-half ($1\frac{1}{2}$) interest in and to the "Butte and Boston" Placer Mining Claim, located Dec. 20th, 1890, by C. F. Booth, W. V. Lawlor and S. V. Kemper, said location is recorded at page "25" book "B" of "Placer and Millsite" Records of Silver Bow County, State of Montana, said claim being designated as survey Number 3379.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining as usually had and enjoyed.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances unto the said party of the second part and to his heirs and assigns forever.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals the day and year first above written.

[1401] SIMEON V. KEMPER. [Seal]

SALLIE B. KEMPER. [Seal]

Duly acknowledged by the grantors, and filed for record June 30th, 1892.

Then follows a certificate by the County Clerk and Recorder of Silver Bow County, Montana, to the effect that the foregoing is a true copy of the original as it appears of record at page 378 in Book "3" of Deed Records of Silver Bow County, Montana.

**[Complainant's Exhibit No. 9—Letters Patent Dated
December 19, 1895, Granted to Simeon V.
Kemper and Josephine Lorenz.]**

[1402] (No. 443. In Equity. Compl. Exhibit
No. 9. Oliver T. Crane, Examiner.)

GENERAL LAND OFFICE

No. 26344.

MINERAL CERTIFICATE.

No. 3170.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the Plat and Field Notes of Survey and the Certificate No. 3170, of the Register of the Land Office at Helena, in the State of Montana, accompanied by other evidence, whereby it appears that Simeon V. Kemper and Josephine Lorenz did, on the fourth day of September, A. D. 1895, duly enter and pay for that certain placer mining claim and premises, designated by the Surveyor General as Lot No. 3379, known as the Butte and Boston Placer mining claim, and embracing a portion of township three north of range seven west of the Principal meridian, in the ——— Mining District, in the County of Silver Bow and State of Montana, in the District of Lands subject to sale at Helena, and bounded, and described, and platted

as follows, with magnetic variation as hereinafter stated. Beginning at corner No. 1, a quartz stone 20 x 12 x 11 inches, marked 1-3379, in mound of earth, being also corner No. 1 of survey No. 2952, the May Yohe placer claim, and the east quarter corner of section seventeen in township three north of range seven west of the Principal Meridian, from which discovery shaft bears south fifty-three degrees and twelve minutes east three hundred and fifteen feet distant. Thence first course, magnetic variation twenty degrees and fifteen minutes east, east four hundred and seventy-three feet across ditch; eight hundred and eighteen feet to corner No. 2, a quartzite stone marked 2-3379, thence, second course, magnetic [1403] variation twenty degrees and fifteen minutes east, south sixty-three degrees and fifteen minutes east eight hundred feet to corner No. 3, a granite stone 20 x 8 x 6 inches, marked 3-3379. Thence third course, magnetic variation twenty-one degrees east, south forty-two degrees and five minutes east three hundred and ninety-eight feet to corner No. 4, a granite stone marked 4-3379; thence, fourth course, magnetic variation twenty-one degrees and thirty minutes east, north eighty degrees and fifty minutes west one hundred and eighty-two feet to corner No. 5, a quartz stone marked 5-3379. Thence, fifth course, magnetic variation nineteen degrees and fifteen minutes east, south seventy-seven degrees and twelve minutes west one thousand five hundred and seven feet to corner No. 6, a quartz stone marked 6-3379.

Thence, sixth course, magnetic variation twenty

degrees east, south twelve degrees and forty-eight minutes east three hundred and ninety-four feet to corner No. 7, a granite stone marked 7-3379. Thence seventh course, magnetic variation twenty degrees east, north eighty-seven degrees west two hundred and thirty-two and five-tenths feet to corner No. 8, a fir post marked 8-3379. Thence eighth course, magnetic variation twenty degrees east, north twelve minutes west one thousand three hundred and thirty-two feet to corner No. 1, the place of beginning; said lot No. 3379 containing twenty-eight acres and twenty-five hundredths of an acre of land, more or less.

NOW KNOW YE, That there is therefore hereby GRANTED by the United States unto the said Simeon V. Kemper and Josephine Lorenz, and to their heirs and assigns, the said placer mining premises hereinbefore described.

TO HAVE AND TO HOLD said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantees above named, and to their heirs and assigns forever; subject nevertheless to the [1404] following conditions and stipulations: First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said mining premises, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, which may have been discovered within said limits subsequent to and which were not known to exist on the eleventh day of May, A. D. one thousand

eight hundred and ninety-one; Second. That should any vein or lode of quartz or other valuable deposits, be claimed or known to exist within the above-described premises at said last-named date, the same is expressly excepted and excluded from these presents. Third. That the premises hereby conveyed may be entered by the proprietor of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting and removing the ore from such vein or lode, should the same, or any part thereof, be found to penetrate, intersect, pass through, or dip into the mining ground or premises hereby granted. Fourth. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals, constructed by the authority of the United States. Fifth. That in the absence of necessary legislation by Congress, the legislature of Montana may provide rules for working the mining claim or premises hereby granted, involving easement, drainage, and other necessary means to the complete development thereof.

IN TESTIMONY WHEREOF, I, GROVER CLEVELAND, President of the United States of America, have caused these Letters to be made

PATENT, and the Seal of the General Land Office to be hereunto affixed.

[1405] GIVEN under my hand at the City of Washington the nineteenth day of December in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth.

[U. S. General Land Office Seal]

By the President:

GROVER CLEVELAND.

By M. McKEEN,
Secretary.

L. Q. C. LAMAR,

Recorder of the General Land Office.

(E. G. E.)

Recorded Vol. 236, pages 313 to 316, inclusive.

Filed for record on the 22d day of Nov. A. D. 1901,
at 45 min. past 1 o'clock P. M.

JOHN WESTON,
County Recorder.

Then follows a certificate by the County Recorder that the foregoing is a full and true copy of the original as recorded at page 82 of Book "E" of Patent Records of Silver Bow County, Montana.

[Complainant's Exhibit No. 10—Bargain and Sale Deed Dated June 15, 1895—Simeon V. Kemper and Sallie B. Kemper and the Butte Land and Investment Company.]

[1406] (No. 443. In Equity. Compl. Exhibit No. 10. Oliver T. Crane, Examiner.)

THIS INDENTURE, Made the 15th day of June, in the year of our Lord one thousand eight hundred

and ninety-five, between Simeon V. Kemper and Sallie B. Kemper, his wife, both of the City of Butte, County of Silver Bow, and State of Montana, parties of the first part and the "Butte Land and Investment Co.," a corporation duly organized and existing under the laws of the State of Montana, the party of the second part.

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of One Hundred Thousand (100000.) Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part and to its successors and assigns forever, all the following described property, situate, lying and being in Silver Bow County, State of Montana, and particularly described as follows, to wit:

The "Herxes" Lode Mining Claim, designated by the Surveyor General as Lot No. 3684, embracing a portion of Section thirty-six in township three north range eight west of the Principal Meridian of Montana; also the "Jefferson" Lode Mining Claim, designated by the Surveyor General, as Lot No. 3685, embracing a portion of section thirty-six in township three north of range eight west of the principal Meridian of Montana;

Also Section six (6) in township two (2) north of range seven (7) west of the Principal Meridian of Montana, containing six hundred and forty (640) acres, more or less; also

An undivided one-fourth ($\frac{1}{4}$) interest in and to the west one-half ($\frac{1}{2}$) of Section eight (8) in township two (2) north of range seven (7) West of the Principal Meridian of Montana, containing three hundred and twenty (320) acres more or less; also

[1407] All the right, title and interest of the said parties of the first part, in and to the south one-half ($\frac{1}{2}$) of the southwest one-fourth ($\frac{1}{4}$); the northeast one-fourth ($\frac{1}{4}$) of the southwest one-fourth ($\frac{1}{4}$) and the east one-half ($\frac{1}{2}$) of the southeast one-fourth ($\frac{1}{4}$) of the northwest one-fourth ($\frac{1}{4}$) of section nineteen (19), in township three (3) north of range seven (7) west of the Principal Meridian of Montana, containing one hundred and forty (140) acres, more or less; also

The undivided one-half ($\frac{1}{2}$) of that portion of section sixteen (16) in township three (3) north of range seven (7) west of the Principal Meridian of Montana, described by metes and bounds as follows, to wit: Beginning at the one-quarter ($\frac{1}{4}$) section corner, between sections sixteen (16) and seventeen (17) in said township; running thence east eight hundred and eighteen (818) feet, at a point on the end line of the Rising Sun Lode Mining Claim, Lot 246; thence south sixty-three (63) degrees and fifteen (15) minutes east three hundred and seventeen and one-half (317.5) feet; thence south seventy-seven (77) degrees and twelve (12) minutes west three hundred and eighty-seven (387) feet; thence south twelve (12) minutes, east six hundred (600) feet, to the north side line of the Bullwhacker Lode

Mining Claim, Lot 255; thence south seventy-seven (77) degrees and twelve (12) minutes west, along the north side of said Bullwhacker Claim, five hundred and ninety-three and one-half (593.5) feet; thence south twelve (12) degrees and forty-eight (48) minutes east, along the west end line of said Bullwhacker claim, three hundred and ninety-four (394) feet; thence north eighty-seven (87) degrees west, two hundred and thirty-two and one-half (232.5) feet to the section line, between said sections sixteen (16) and seventeen (17); thence north twelve (12) minutes west, along said section line thirteen hundred and thirty-two (1332) feet to the place of beginning, containing seventeen and seventy-one hundredths (17.71) acres, more or less; also

The south one-half ($\frac{1}{2}$) of the Southeast one-fourth ($\frac{1}{4}$); [1408] the northwest one-fourth ($\frac{1}{4}$) of the southeast one-fourth ($\frac{1}{4}$) and the west one-half ($\frac{1}{2}$) of the Northeast one-fourth ($\frac{1}{4}$) of the Southeast one-fourth ($\frac{1}{4}$) of Section thirty-two (32) in township three (3) North of Range seven (7) West of the Principal Meridian of Montana; also

All right, title and interest, in and to a water right in Basin Creek, together with the ditch connecting said Basin Creek with the last above-described property. Notice of Location of said Water right is recorded at page 54 in Book "A" of Miscellaneous Records of Silver Bow County, State of Montana, to which reference is hereby had for a more particular description.

Together with all and singular the tenements, hereditaments and appurtenances, thereunto belong-

ing or in any wise appertaining, as usually had and enjoyed.

To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, and to its successors and assigns forever.

In Witness Whereof, we have hereunto set our hands and seals the day and year first above written.

SIMEON V. KEMPER. [Seal]

SALLIE B. KEMPER. [Seal]

Duly acknowledged, and filed for record June 15, 1895.

Then follows a certificate by the County Recorder to the effect that the foregoing is a true copy of the original of record at page 172 of Book 14 of Deed, Records of Silver Bow County, Montana.

[Complainant's Exhibit No. 11—Bargain and Sale Deed Dated June 24, 1895—James W. Kemper and Mary M. Kemper and Simeon V. Kemper and Sallie B. Kemper.]

[1409] (No. 443. In Equity. Compl. Exhibit No. 11. Oliver T. Crane, Examiner.

THIS INDENTURE, Made the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and ninety-five, between James W. Kemper and Mary M. Kemper, his wife, and Simeon V. Kemper and Sallie B. Kemper, his wife, all of the City of Butte, County of Silver Bow, and State of Montana, parties of the first part, and the "Butte Land and Investment Co." a corporation duly organized and existing under the laws of the State of Montana, the party of the second part, WITNESS-

ETH: That the said parties of the first part, for and in consideration of the sum of Sixteen Thousand Two Hundred and Fifty (16250) Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey, unto the said party of the second part, and to its successors and assigns, forever, all following described property, situate, lying and being in Silver Bow County, State of Montana, and particularly described as follows, to wit:

An undivided five-eighths ($\frac{5}{8}$) interest, in and to the West one-half ($\frac{1}{2}$) of Section eight (8) in Township two (2) North of range seven (7) West of the Principal Meridian of Montana; also

All the right, title and interest of the said parties of the first part, in and to the "Butte and Boston" Placer Mining Claim, Survey No. 3379, being a portion of Section sixteen (16) in township three (3) north of range seven (7) West of the Principal Meridian of Montana.

Together with all and singular the tenements, hereditaments and appurtenances, thereunto belonging or in anywise appertaining, as usually had and enjoyed.

To have and to hold all and singular the said premises, [1410] together with the appurtenances, unto the said party of the second part, and to its successors and assigns forever.

IN WITNESS WHEREOF, we have hereunto set

our hands and seals the day and year first above written.

JAMES W. KEMPER. [Seal]

MARY M. KEMPER. [Seal]

SIMEON V. KEMPER. [Seal]

SALLIE B. KEMPER. [Seal]

Duly acknowledged, and filed for record June 26, 1895.

Then follows certificate by county recorder of Silver Bow County, Montana, to the effect that the foregoing is a true copy of the original as it appears of record at page 203 in Book "14" of Deed, Records of Silver Bow County, Montana.

[Complainant's Exhibit No. 12—Certificate of Incorporation Dated June 13, 1895.]

[1411] (No. 443. In Equity. Compl. Exhibit No. 12. Oliver T. Crane, Examiner.

CERTIFICATE OR INCORPORATION.

The undersigned, citizens of the State of Montana, for the purpose of forming an incorporation, under and by virtue of the laws of said State do hereby certify as follows, to-wit:

First: The name of said corporation shall be the "BUTTE LAND AND INVESTMENT CO."

Second. The object for which said company is formed, is to buy, hold, lease, deal in, improve, and sell real estate; to purchase, hold, lay out, plat, develop, lease, sell, deal in, convey or otherwise use or dispose of townsites or towns or the lots, blocks or subdivisions thereof; to purchase material for, erect, buy, occupy, rent, improve and sell buildings and other improvements on real estate; to construct, own, maintain and operate street railways, water works,

ditches, electric plants and other auxiliary improvements in connection with the company's real estate; to buy, sell, lease, bond, and operate mines; to loan and borrow money and buy and sell and otherwise deal in securities and investments and to perform all necessary acts in developing, improving and dealing in mines, lands, townsites or parts thereof and negotiating and otherwise owning and handling investments and loans.

Third. The amount of the capital stock of said company shall be two hundred thousand (200,000) dollars, divided into twenty thousand (20,000) shares, of the par value of ten (10) dollars each.

Fourth. The said Company shall commence on the fifteenth day of June, in the year one thousand eight hundred and ninety-five and continue in existence for the term of forty (40) years.

Fifth: The number of trustees who shall manage the concerns of said company for the first three months, shall be three and their names are S. V. Kemper, J. W. Kemper and Jas. A. Canty.

Sixth: The operations of said company shall be carried on in [1412] the vicinity of Butte, County of Silver Bow, State of Montana. And the City of Butte shall be the principal place of business of said company.

IN WITNESS WHEREOF, we have this 13th day of June, 1895, placed our hands and seals, in duplicate.

S. V. KEMPER. [Seal]

J. W. KEMPER. [Seal]

JAMES A. CANTY. [Seal]

Duly acknowledged.

Then follows a certificate by the county clerk and recorder that the foregoing is a true copy of the original filed for record in his office June 14, 1895.

[Complainant's Exhibit No. 13—Bargain and Sale Deed Dated May 9, 1910—The Butte Land and Investment Co. and the Washington Butte Mining Company.]

[1413] (No. 443. In Equity. 'Compl. Exhibit No. 13. Oliver T. Crane, Examiner.)

THIS INDENTURE, Made the 9th day of May, in the year of our Lord one thousand nine hundred and ten, between the Butte Land and Investment Co., a corporation duly organized and existing under and by virtue of the laws of the State of Montana, the party of the first part, and the Washington-Butte Mining Company, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, the party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of one and no/100 (\$1.00) Dollars, lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to its successors and assigns forever, all those certain lode mining claims situate, lying and being in the County of Silver Bow and State of Montana, described as follows, to wit:

All that portion of the Butte and Boston placer Mining Claim, Survey #3379, situated in Section 16, Township 3 North Range 7 West, described by metes and bounds as follows, to wit: Beginning at the

northwest corner of the ground herein described, which point is Corner No. 1 of said Survey #3379 and the east quarter corner of Section 17, Township 3 North Range 7 West of the Principal Meridian of Montana, thence first course east 818 feet to Corner No. 2; thence second course south 63 degrees 15 minutes east 317.5 feet; thence third course south 77 degrees 12 minutes west 378 feet; thence fourth course south 0 degrees 12 minutes east 600 feet to a point on the south boundary line of said Survey #3379; thence fifth course south 77 degrees 12 minutes west 600.2 feet to corner No. 6 of said Survey #3379; thence sixth course south 12 degrees 48 minutes east 394 feet to corner No. 7; thence seventh course north 87 degrees west 232.5 feet to corner No. 8; thence eighth course north 0 degrees 12 minutes west 1332 feet to corner No. 1, the place of beginning, containing [1414] approximately 19.25 acres.

Together with other mining claims and property.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, as usually had and enjoyed.

To have and to hold all and singular the said premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to their own proper use, benefit and behoof forever. And the said party of the first part does hereby covenant, promise and agree, to and with the said party of the second part, its successors and assigns, that the said party of the first part, at the time of the sealing and delivery of these presents, is lawfully seized in a good, absolute and indefeasible estate of inheritance,

Washington-Butte Mining Company. 1723

in fee simple, of and in, all and singular the said premises, with the appurtenances, and have good right and lawful authority to grant, bargain, sell and convey the same.

In Witness Whereof, the said party of the first part has hereunto caused its corporate seal to be affixed, and these presents to be signed by its president and attested by its secretary the day and year first above written.

BUTTE LAND AND INVESTMENT CO.

By J. W. KEMPER,

President.

Attest: E. E. SHIELDS,

Secretary.

Duly acknowledged May 9, 1910.

Filed for record Dec. 1st, 1911, and recorded on page 524 of Book 101, Deed, Records of Silver Bow County, Montana.

**[Complainant's Exhibit No. 38—Certificate of Assay
Dated Butte, Montana, December 15, 1911.]**

[1415] (No. 443. In Equity. Compl. Exhibit. No. 38. Oliver T. Crane, Examiner.)

ANACONDA COPPER MINING COMPANY,
General Assay Office.

CERTIFICATE OF ASSAY.

Butte, Montana, Dec. 15, 1911.

Mr. F. A. Linforth, Geol. Dep't.

Marks	Per cent Copper.	Ozs. Silver Per Ton.
B. & B. #1	1.90	0.40
" " " 2	1.70	trace
" " " 3	1.40	trace

J. C. FEBLES,

Assayer.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Complainant's Exhibit No. 39—Certificate of Assay
Dated Butte, Montana, December 20, 1911.]**

[1416] (No. 443. In Equity. Compl. Exhibit No.
39. Oliver T. Crane, Examiner.)

ANACONDA COPPER MINING COMPANY,
General Assay Office.

CERTIFICATE OF ASSAY.

Butte, Montana, Dec. 20, 1911.

Mr. F. A. Linforth, Geol. Dept.

Marks	Per cent Copper	Ozs Silver Per Ton	Dol. Gold Per Ton.
4	0.40	0.30	0.20
5	trace	0.20	trace
6	0.70		

J. C. FEBLES,
Assayer.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Complainant's Exhibit No. 40—Certificate of Assay
Dated Butte, Montana, January 8, 1912.]**

[1417] (No. 433. In Equity. Compl. Exhibit No.
40. Oliver T. Crane, Examiner.)

ANACONDA COPPER MINING COMPANY,
General Assay Office.

CERTIFICATE OF ASSAY.

Butte, Montana, Jan. 8, 1912.

Mr. R. H. Sales,
Geol. Dept.

Marks.			Per-Cent. Copper.	Ozs. Silver Per Ton.	Dol. Gold Per Ton.
B & B#7	Per F. A. L.		1.30	0.80	Trace
" " " 8	" "		1.40	0.40	"
" " " 9	" "		1.00	0.20	"
" " " 10	" "		0.80	0.20	"
" " " 11	" "		0.40	trace	"
" " " 12	" "		0.60	"	"
" " " 13	" "		0.90	0.10	"
" " " 14	" "		5.00	0.30	"
" " " 15	" "		7.40	0.40	"

J. C. FEBLES,
Assayer.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

[Defendants' Exhibit No. 2—Notice of Location and Declaratory Statement of Discovery and of Claim to Quartz Lode Mining Claim.]

[1418] (No. 443. In Equity. Defts. Exhibit No. 2. Oliver T. Crane, Examiner.)

NOTICE OF LOCATION AND DECLARATORY STATEMENT OF DISCOVERY AND OF CLAIM TO QUARTZ LODGE MINING CLAIM.

Pleasant View Lode Mining Claim,
Summit Valley Mining District,
Silver Bow County, State of Montana.

THE UNDERSIGNED, who are citizens of the United States, HEREBY DECLARE AND GIVE NOTICE TO ALL PERSONS CONCERNED, That they have discovered a Vein or Lode within the limits of the claim hereby located, and in said lode a vein or crevice of quartz or ore, with at least one well-defined wall, and that they have this 1st day of April, A. D. 1890, located, and do hereby locate and claim, under and by virtue of Chapter Six, of Title Thirty-two, of the Revised Statutes of the United States, and the laws amendatory thereto, and the laws of the State of Montana, a Mining Claim upon said lode or vein, to be designated and named the Pleasant View Quartz Lode Mining Claim, extending along said vein or Lode 900 feet in an Easterly direction, and 600 feet in a westerly direction from the center of the Discovery Shaft (at which shaft this notice and statement is posted), and 300 feet on each side from the middle or center of said Lode or Vein at the surface;

Comprising in all 1500 feet in length along said Vein or Lode, and 600 feet in width, with all the rights and privileges, as to surface ground, and lodes, and veins or ledges, within the boundaries of said claims, and otherwise, and the metals, minerals and valuable deposits of every kind contained in said veins, lodes, or ledges, or within said boundaries, which are given or allowed by the laws of the United States aforesaid, or of the State of Montana.

THE MINING CLAIM hereby located is situated in Summit Valley Mining District, Silver Bow County, State of Montana, and is midway [1419] between the mouth of Park and Horse Canyons.

THE ADJOINING CLAIMS are the Bullwhacker Claim on the South; ——— Claim on the ———.

THIS LOCATION is distinctly marked on the ground, so that its boundaries can be readily traced by a Post, set at Discovery Shaft, where this notice and statement is posted this first day of April, A. D., 1890, and by substantial posts or monuments of stone at each corner of the claim; and the exterior boundaries of the claim, as marked by said post or monuments, are as follows, to wit:

BEGINNING at the S. W. Cor. which is S. $77^{\circ} 12'$ W. 150 feet from the N. W. Cor. of the Bullwhacker Lode; thence running North 600 feet; thence N. $77^{\circ} 12'$ E. 1500 feet; thence South 600 feet to the north line of Bullwhacker lode; thence South $77^{\circ} 12'$ W. 1500 feet to the place of beginning.

THE UNDERSIGNED intend to hold this claim under and according to the Laws of the United States and of the State of Montana, and to record

this Notice and Statement, under oath, in the County Recorder's Office of said County, as provided by law.

Dated this first day of April, 1890, and signed:

CHAS. S. PASSMORE,

LEVI J. HAMILTON,

Locators and Claimants.

[1420] State of Montana,

County of Silver Bow,—ss.

Charles S. Passmore, being duly sworn, says, that he is of lawful age, and a citizen of the United States, and one of the locators and claimants of the Quartz Lode Claim mentioned and described in the foregoing Notice and Statement of Location and Claim, and the persons whose names are subscribed thereto as the locators and claimants are citizens of the United States, that he knows the contents of said Notice and Statement foregoing, and that the matter and things therein stated are true.

CHAS. S. PASSMORE.

Subscribed and sworn to before me this 5th day of April, 1890.

[Notarial Seal] WILLIAM I. LIPPINCOTT,
Notary Public in and for Silver Bow County, State
of Montana.

Filed for record, April 5, A. D. 1890, at 11 o'clock
A. M.

C. F. BOOTH,

County Recorder.

By T. E. Booth,

Deputy.

(Then follows a certificate of the County Clerk of

Silver Bow County, Montana, that the foregoing is a true copy of the original.)

(Exhibit Endorsed: Filed and entered Apr. 17, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy. 1.50 Pd.)

[Defendants' Exhibit No. 3—Notice of Location and Declaratory Statement of Discovery and of Claim to Quartz Lode Mining Claim.]

[1421] (No. 443. In Equity. Defts. Exhibit 3. Oliver T. Crane, Examiner.)

**NOTICE OF LOCATION AND DECLARATORY
STATEMENT OF DISCOVERY AND OF
CLAIM TO QUARTZ LODGE MINING
CLAIM.**

Point Pleasant Lode Mining Claim.

Summit Valley Mining District,

Silver Bow County, State of Montana.

THE UNDERSIGNED, who are citizens of the United States, HEREBY DECLARE AND GIVE NOTICE TO ALL PERSONS CONCERNED, that they have discovered a Vein or Lode within the limits of the claim hereby located, and in said lode a vein or crevice of quartz or ore, with at least one well-defined wall, and that they have this 1st day of April, A. D. 1890, located, and do hereby locate and claim, under and by virtue of Chapter Six, of Title Thirty-two, of the Revised Statutes of the United States and the laws amendatory thereto, and the laws of the State of Montana, a Mining Claim upon said Lode or Vein, to be designated and named the Point Pleasant Quartz Lode Mining Claim; extending along said vein or lode 50 feet in an Easterly direction and 1450

feet in a Westerly direction from the center of the Discovery Shaft (at which shaft this notice and statement is posted), and 300 feet on each side from the middle or center of said Lode or Vein at the surface: Comprising in all 1500 feet in length along said vein or lode, and 600 feet in width, with all the rights and privileges, as to surface ground and lodes, and veins or ledges, within the boundaries of said claims, and otherwise, and the metals, minerals and valuable deposits of every kind contained in said veins, lodes, or ledges, or within said boundaries, which are given or allowed by the laws of the United States aforesaid, or of the State of Montana.

THE MINING CLAIM hereby located is situated in Summit Valley Mining District, Silver Bow County, State of Montana, and is about [1422] one-fourth ($\frac{1}{4}$) of a mile north from the mouth of Horse Canyon.

THE ADJOINING CLAIMS are the Pleasant View Claim on the South.

THIS LOCATION IS distinctly marked on the ground, so that its boundaries can be readily traced by a post, set at Discovery Shaft, where this notice and statement is posted this 1st day of April, A. D. 1890, and by substantial posts or monuments of stone at each corner of the claim; and the exterior boundaries of the claim, as marked by said post or monuments, are as follows, to-wit:

BEGINNING at the South West corner Post and running thence northerly 600 feet; thence Easterly 1500 feet; thence Southerly 600 feet; thence Westerly 1500, to the place of beginning.

THE UNDERSIGNED intend to hold this claim under and according to the laws of the United States and of the State of Montana, and to record this Notice and Statement, under oath, in the County Recorder's Office of said County, as provided by law.

Dated this 1st day of April, 1890, and signed.

CHAS. S. PASSMORE,
LEVI J. HAMILTON,
Locators and Claimants.

State of Montana,
County of Silver Bow,—ss.

Charles S. Passmore, being duly sworn, says, that he is of lawful age, and a citizen of the United States, and one of the locators and claimants of the quartz lode mining claim mentioned and described in the foregoing Notice and Statement of Location and Claim, and the persons whose names are subscribed thereto as the locators and claimants are citizens of the United States, that he knows the contents of said Notice and Statement foregoing, and that the matter and things therein stated are true.

CHAS. S. PASSMORE.

Subscribed and sworn to before me, this 11th day of April, 1890.

[Notarial Seal]

OLIVER N. PERRY,
Notary Public.

Filed for record, April 11, A. D. 1890, at 34 min.
past 12 o'clock P. M.

C. F. BOOTH,
County Recorder.
By T. E. Booth,
Deputy.

(Then follows certificate of County Clerk and Recorder that foregoing is full, true and complete copy.)

[Defendants' Exhibit No. 4—Mining Deed Dated April 16, 1891—Levi J. Hamilton and Eliza S. Hamilton and Charles S. Passmore and Susie M. Passmore.]

[1423] (No. 443. In Equity. Defts. Exhibit No. 4. Oliver T. Crane, Examiner.)

MINING DEED.

THIS INDENTURE, Made the sixteenth day of April in the year of our Lord One Thousand Eight Hundred and Ninety-one, Between Levi J. Hamilton and Eliza S. Hamilton, his wife, and Charles S. Passmore and Susie M. Passmore, his wife, all of Butte City, County of Silver Bow and State of Montana, parties of the first part, and Louis M'Clellen Mason of same place, County and State, party of the second part, Witnesseth: That the said parties of the first part, for and in consideration of the sum of One Thousand Dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, conveyed and quit-claimed, and by these presents do grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part, and to his heirs and assigns forever, an undivided one-eighth ($\frac{1}{8}$) interest of & in all the right, title and interest, estate claim and demands, of said parties of the first part, of, in and to that certain portion, claim and mining right, title and property on those certain ledges veins, lode or

deposits of quartz and other rock in place, containing precious metals of gold, silver, and other metals, and situated in the Summit Valley Mining District, County of Silver Bow, and State of Montana, and described as follows, to-wit: An undivided one-eighth ($\frac{1}{8}$) interest of, in and to the Point Pleasant Quartz Lode Mining Claim, as described in the Notice of Location and Declaratory Statement as recorded with the Clerk and Recorder in Book "H" on Page 331 of Silver Bow County, State of Montana. Also an undivided one-eighth ($\frac{1}{8}$) interest of, in and to the Pleasant View Quartz Lode Mining Claim, as described in Notice of Location and Declaratory Statement as recorded in Book "H" on Page 324 with the Clerk and Recorder of Silver Bow County, State of Montana.

Together with all the dips, spurs and angles, and also all the metals, ores, gold, silver and metal bearing quartz, rock and earth [1424] therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all the estate, right, title, interest, possession, claim and demand whatsoever, of the said parties of the first part, of, in or to the premises, and every part and parcel thereof.

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part.

IN WITNESS WHEREOF, the said parties of the first part, have hereunto set their hands and seals

the day and year first above written.

LEVI J. HAMILTON. [Seal]

CHARLES S. PASSMORE. [Seal]

ELIZA S. HAMILTON. [Seal]

SUSIE M. PASSMORE. [Seal]

(Duly acknowledged by all of the grantors.)

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 11—Mining Deed Dated
March 14, 1895—Lee Davenport and Minnie
Davenport and Louis Mason.]**

[1425] (No. 443. In Equity. Defts. Exhibit No.
11. Oliver T. Crane, Examiner.)

MINING DEED.

THIS INDENTURE, Made the 14th day of March in the year of our Lord one thousand eight hundred and ninety-five, between Lee Davenport and Minnie Davenport, his wife, of Silver Bow County, Montana, parties of the first part, and Louis Mason, of same place, party of the second part, Witnesseth: That the said parties of the first part, for and in consideration of the sum of One Dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, conveyed and quit-claimed and by these presents, do grant, bargain, sell, remise, release, convey and quit-claim unto the said party of the second part and to his heirs and assigns forever, all the right, title and interest, estate, claim and demands of said parties of the first part, of, in and to that certain portion,

claim and mining right, title and property on the Lynnie certain ledge, vein, lode or deposits of quartz and other rock in place, containing precious metals of gold, silver and other metals and situated in the unknown Mining District, County of Silver Bow, and State of Montana, and described as follows, to-wit: An undivided one-eighth ($\frac{1}{8}$) interest in and to the Lynnie Quartz Lode Mining Claim, located about one mile east of the Silver Bow Mill and adjoining the Bullwhacker Lode Mining Claim on the North.

Together with all the dips, spurs and angles, and also all the metals, ores, gold, silver and metal bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all the estate, right, title, interest, possession, claim and demand whatsoever, of the said parties of the first part of, in or to the premises, and every part and parcel thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances, and privileges thereto incident, [1426] unto the said party of the second part.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

LEE DAVENPORT. [Seal]

MINNIE DAVENPORT. [Seal]

(Duly acknowledged by the grantors.)

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 12—Lease and Bond Dated
May 2, 1900—Isaac Knoyle and Samuel Kift
and Louis Mason.]**

[1427] (No. 443. In Equity. Defts. Exhibit No.
12. Oliver T. Crane, Examiner.)

LEASE AND BOND.

THIS INDENTURE, made and entered into this second day of May, 1900, by and between Isaac Knoyle and Samuel Kift, parties of the first part, and Louis Mason party of the second part, WITNESSETH.

That the said parties of the first part do hereby lease and to mine let unto the said party of the second part the Hornet quartz lode claim, situated in Summit Valley Mining District, Silver Bow County, Montana, and located in Section 16, T. 3 N. R. 7 W., said County, and lying northerly from the Bull Whacker lode claim, for the term of two years from and after the first day of May, 1900.

And the said second party shall have the right to immediately enter upon the said quartz lode claim and to mine and extract ores therefrom and to carry away, sell, dispose of, smelt and convert to his own use all of the ores and minerals which may be extracted during the term of this lease.

That said second party shall do all work and mining in a good and workmanlike manner, and securely timber all openings wherever necessary to the proper protection of the same and to proper mining of said lode claim.

And the said first parties do hereby deliver pos-

session to the whole of said quartz lode claim to the said second party for the purpose of carrying on mining and doing mining work therein under this lease.

As part of this lease, it is further agreed and understood that the said party of the second part shall have a right at any time during the term of this lease to purchase the interests of the parties of the first part in and to said quartz lode claim; and the parties of the first part, in consideration of the said second party taking said lease and of the sum of one dollar in hand paid, do hereby bind themselves to sell and convey unto the said second party, or his assigns, all their right, title and interest in and to said [1428] quartz lode claim, at any time within two years hereafter, and to make, execute and deliver a deed of conveyance conveying their said interests, provided said second party, or his assigns, shall pay to the said first parties, for their right, title and interest in and to said quartz lode claim, at any time within two years hereafter, the sum of five hundred dollars.

IN WITNESS WHEREOF, the said first parties have hereunto set their hands, this second day of May, 1900.

ISAAC KNOYLE.

SAMUEL KIFT.

LEWIS MASON.

(U. S. 50¢ revenue stamp.)

(Duly acknowledged before John W. Cotter,
Notary Public, by grantors.)

I hereby sell, assign and transfer the foregoing

lease and agreement and all of my rights therein and thereunder to R. O. Merriman.

Dated May 2d, 1900.

LEWIS MASON.

(Recorded in Vol. A of Leases, page 457, May 24, 4-08 P. M. 1900. J. E. Moran, Clerk and Recorder, Silver Bow Co., Mont. By H. E. Burke, Dept. \$2.00 Pd.)

For value received, I hereby sell, assign and transfer an undivided one-half interest of, in and to the foregoing lease and agreement and all of my rights therein and thereunder to Louis Mason of Butte, Montana.

Dated May 26, 1900.

R. O. MERRIMAN.

(Duly acknowledged, and recorded on June 2d, Book B, Leases, page 404.)

(Filed and entered Apr. 17, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy.)

[Defendants' Exhibit No. 13—Declaratory Statement of the Olivia Lode Mining Claim.]

[1429] (No. 443. In Equity. Defts. Exhibit No. 13. Oliver T. Crane, Examiner.)

**DECLARATORY STATEMENT OF THE
OLIVIA LODGE MINING CLAIM.**

NOTICE IS HEREBY GIVEN, That the undersigned, who is citizen of the United States, has discovered a vein or lode of quartz or other rock in place, bearing gold, copper and other valuable deposits, and after said discovery, to-wit, on the 16th day of May, 1900, did locate the said vein or lode as the Olivia Lode Mining Claim, by posting the notice required

by law at the point of discovery.

The general course of the vein is easterly and westerly.

The total length of surface included in said location is Fifteen Hundred feet along the course of the vein, being 325 feet in an easterly direction, and 1175 feet in a westerly direction from the said point of discovery, and the total width of the said surface is six hundred feet, being 300 feet on the North side and 300 feet on the south side of the middle of the vein.

The boundaries of the said location are so distinctly marked upon the ground that they can be readily traced, being more particularly described as follows, to-wit:

Beginning at the northeast corner, which is marked by a post not less than four inches square and four feet six inches in length, set one foot in the ground, marked "Northeast corner No. 1 Olivia Lode," with a mound of earth four feet in diameter by two feet in height around said post; and running thence in a westerly direction 1500 feet to the northwest corner, which is marked by a post not less than four inches square and four feet six inches in length, set one foot in the ground, marked "Northwest corner No. 2 Olivia Lode," with a mound of earth four feet in diameter and two feet in height around said post; and running thence in a southerly direction 600 feet to the southwest corner, which is marked by a post not less than four inches square by four feet six inches in length, set one foot in the ground, marked "Southwest corner No. 3, [1430] Olivia Lode,"

with a mound of earth four feet in diameter and two feet in height around said post; and running thence in an easterly direction 1500 feet to the southeast corner, which is marked by a post not less than four inches square by four feet six inches in length, set one foot in the ground, marked "South-east corner No. 4 Olivia Lode," with a mound of earth four feet in diameter and two feet in height around said post; and running thence in a Northerly direction 600 feet to the place of beginning.

The said claim is situated in Summit Valley Mining District (unorganized) in Silver Bow County, Montana, and measured from discovery point of said claim as an initial point the following natural objects and permanent monuments are distant, as follows, to-wit: New North Pacific Round House is distant about $\frac{3}{4}$ mile in a westerly direction,— is distant — in a — direction. The adjoining claims are as follows, to-wit:

On the north, the Copper Queen Lode Mining Claim;

On the east, the ——— Lode Mining Claim;

On the south, the ——— Lode Mining Claim;

On the west, the ——— Lode Mining Claim.

This claim is situated in Section Sixteen, Township Three N. R. 7 W., Montana Meridian.

For the purpose of perfecting the location of this claim as required by law, the undersigned has heretofore, and within ninety days after posting said notice of location, done or caused to be done the following development work on said claim, to-wit: By sinking a discovery shaft to a depth of ten and $\frac{1}{2}$ (10- $\frac{1}{2}$)

Washington-Butte Mining Company. 1741

feet, and said development work has disclosed a well defined crevice and valuable deposit of ore.

The undivided interest in the above described location claimed by each of the undersigned is indicated by the fraction set after each name.

R. O. MERRIMAN,
Locator and Claimant.

State of Montana,
County of Silver Bow,—ss.

R. O. Merriman being duly sworn on oath says, that he is of lawful age, and the locator and claimant of the mining claim described on the foregoing declaratory statement; that the said location [1431] has been made in good faith; that he has read the said declaratory statement, and knows the contents thereof, and that all the statements therein contained are true.

R. O. MERRIMAN.

Subscribed and sworn to before me this 22d day of May, 1900.

[Notarial Seal] JOHN N. KIRK,
Notary Public in and for Silver Bow County, State
of Montana.

(Filed for record May 24, 1900, and recorded in Book Q, Declaratory Statements, on page 95, Records Silver Bow County, Montana.)

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

[Defendants' Exhibit No. 14—Declaratory Statement of the Rabbit Lode Mining Claim.]

[1432] (No. 443. In Equity. Defts. Exhibit No. 14. Oliver T. Crane, Examiner.)

DECLARATORY STATEMENT OF THE RABBIT LODGE MINING CLAIM.

NOTICE IS HEREBY GIVEN, That the undersigned, who is a citizen of the United States, has discovered a vein or lode of quartz or other rock in place, bearing copper and other valuable deposits, and after said discovery, to-wit, on the 8th day of May, 1900, did locate the said vein or lode as the Rabbit Lode Mining Claim by posting the notice required by law at the point of discovery.

The general course of the vein is easterly and westerly.

The total length of surface included in said location is 1500 feet along the course of the vein, being 100 feet in a easterly direction, and 1400 feet in a westerly direction from the said point of discovery, and the total width of the said surface is 600 feet, being 300 feet on the north side and 300 feet on the south side of the middle of the vein.

The boundaries of the said location are so distinctly marked upon the ground that they can be readily traced, being more particularly described as follows, to-wit:

Beginning at the north-west corner, which is marked by a post not less than four inches square and four feet six inches in length, set one foot in the ground, marked "North-west corner No. 1 Rabbit

Lode," with a mound of earth four feet in diameter by two feet in height around said post; and running thence in a southerly direction 600 feet to the south-west corner, which is marked by a post not less than four inches square and four feet six inches in length, set one foot in the ground, marked "south-west corner No. 2 Rabbit Lode," with a mound of earth four feet in diameter and two feet in height around said post; and running thence in a easterly direction 1500 feet to the south-east corner, which is marked by a post not less than four inches square by four feet six inches in length, set one foot in the ground, marked "south-east corner No. 3 Rabbit Lode," [1433] with a mound of earth four feet in diameter and two feet in height around said post; and running thence in a northerly direction 600 feet to the north-east corner, which is marked by a post not less than four inches square by four feet six inches in length, set one foot in the ground, marked "north-east corner No. 4 Rabbit Lode," with a mound of earth four feet in diameter and two feet in height around said post; and running thence in a westerly direction 1500 feet to the place of beginning.

The said claim is situated in Summit Valley Mining District in Silver Bow County, Montana, and measured from Discovery Shaft of said claim as an initial point the following natural objects and permanent monuments are distant, as follows, to-wit:

Rand's Ranch is distant about 2000 ft. in a northerly direction; Columbia Gardens is distant about 4000 ft. in an easterly direction. The adjoining claims are as follows, to-wit:

On the north the Copper Queen Lode Mining Claim;

On the east, the Bertha Lode Mining Claim;

On the south, the Hornet Lode Mining Claim;

On the west, the Placer Application No. 888.

For the purpose of perfecting the location of this claim as required by law, the undersigned has heretofore, and within ninety days after posting said notice of location, done or caused to be done the following development work on said claim, to-wit: Sunk discovery shaft 3 ft. by 8 ft. by 10 ft. deep, and said development work has disclosed a well defined crevice and valuable deposit of ore.

The undivided interest in the above described location claimed by each of the undersigned is indicated by the fraction set after each name.

R. O. MERRIMAN,

Locator and Claimant.

[1434] State of Montana,
County of Silver Bow,—ss.

R. O. MERRIMAN, being first duly sworn, on oath says, that he is of lawful age, and the locator and claimant of the mining claim described in the foregoing declaratory statement; that the said location has been made in good faith; that he has read the said declaratory statement, and knows the contents thereof, and that all the statements therein contained are true.

R. O. MERRIMAN.

Subscribed and sworn to before me this 8th day of May, A. D. 1900.

[Notarial Seal] LEWIS A. SMITH,
Notary Public in and for Silver Bow County, State
of Montana.

(Filed for record May 9th, A. D. 1900, and recorded in Book Q of Declaratory Statements, on page 94, Records of Silver Bow County, Montana.)

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

[Defendants' Exhibit No. 15—Declaratory Statement of the Hope Lode Mining Claim.]

[1435] (No. 443. In Equity. Defts. Exhibit No. 15, Oliver T. Crane, Examiner.)

**DECLARATORY STATEMENT OF THE HOPE
LODE MINING CLAIM.**

NOTICE IS HEREBY GIVEN, that the undersigned who is a citizen of the United States has discovered a vein or lode of quartz or other rock in place, bearing gold, copper and other valuable deposits, and after said discovery, to-wit, on the 13th day of May, 1900, did locate the said vein or lode as the "HOPE" Lode Mining Claim, by posting the notice required by law at the point of discovery.

The general course of the vein is Easterly and Westerly.

The total length of surface included in said location is Fifteen Hundred feet along the course of the vein, being 550 feet in an easterly direction, and 950 feet in a westerly direction from the said point of discovery, and the total width of the said surface is

600 feet, being 300 feet on the north side and 300 feet on the south side of the middle of the vein.

The boundaries of the said location are so distinctly marked upon the ground that they can be readily traced, being more particularly described as follows, to-wit:

Beginning at the north-east corner, which is marked by a post not less than four inches square and four feet six inches in length, set one foot in the ground, marked "Northeast corner No. 1 Hope Lode," with a mound of earth four feet in diameter by two feet in height around said post; and running thence in a westerly direction 1500 feet to the North-west corner, which is marked by a post not less than four inches square and four feet six inches in length, set one foot in the ground, marked "Northwest corner No. 2 Hope Lode," with a mound of earth four feet in diameter and two feet in height around said post; and running thence in a southerly direction 600 feet to the southwest corner which is marked by a post not less than four inches square by four feet six inches in length, set one foot [1436] in the ground, marked "South-west corner No. 3 Hope Lode," with a mound of earth four feet in diameter and two feet in height around said post; and running thence in an easterly direction 1500 feet to the south-east corner, which is marked by a post not less than four inches square by four feet six inches in length, set one foot in the ground, marked "South-east corner No. 4, Hope Lode," with a mound of earth four feet in diameter and two feet in height around said post; and running thence in a northerly direction 600 feet to

the place of beginning.

The said claim is situated in Summit Valley Mining District (unorganized) in Silver Bow County, Montana, and measured from Point of Discovery of said claim as an initial point the following natural objects and permanent monuments are distant, as follows, to-wit:

New Northern Pacific Round House is distant $\frac{3}{4}$ mile in a westerly direction; Brundy's house is distant about 2000 in a southerly direction. The adjoining claims are as follows, to-wit:

On the northeast the Bertha Lode Mining Claim;

On the east, the ——— Lode Mining Claim;

On the south, the Bull Whacker Lode Mining Claim;

On the west, the ——— Lode Mining Claim;

This claim is situated in Section Sixteen, Township Three N., R. 7 W., Montana Meridian.

For the purpose of perfecting the location of this claim as required by law, the undersigned has heretofore, and within ninety days after posting said notice of location, done or caused to be done the following development work on said claim, to wit: Discovery Shaft sunk $22\frac{1}{2}$ feet, and said development work has disclosed a well defined crevice and valuable deposit of ore.

The undivided interest in the above described location claimed by each of the undersigned is indicated by the fraction set after each name.

R. O. MERRIMAN,
Locator and Claimant.

[1437] State of Montana,
County of Silver Bow,—ss.

R. O. MERRIMAN, being duly sworn on oath says, that he is of lawful age, and the locator and claimant of the mining claim described in the foregoing declaratory statement; that the said location has been made in good faith; that he has read the said declaratory statement, and knows the contents thereof, and that all the statements therein contained are true.

R. O. MERRIMAN.

Subscribed and sworn to before me this 22nd day of May, 1900.

[Notarial Seal] JOHN N. KIRK,
Notary Public in and for Silver Bow County, State
of Montana.

(Filed for record May 24th, 1900, and recorded in Book Q of Declaratory Statements, on Page 97, Records of Silver Bow County, Montana.)

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 16—Mining Deed Dated
May 26, 1900—R. O. Merriman and Rachael
Merriman and Louis Mason.]**

[1438] (No. 443. In Equity. Defts. Exhibit No.
16. Oliver T. Crane, Examiner.)

MINING DEED.

This Indenture, made the 26th day of May, in the year 1900, between R. O. Merriman and Rachael Merriman, his wife, of Butte, Silver Bow County,

Montana, parties of the first part, and Louis Mason, of Butte, Silver Bow County, Montana, party of the second part, Witnesseth: That the said parties of the first part, for and in consideration of the sum of One Dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell, remise, release, convey and quitclaim unto the said party of the second part and to his heirs and assigns forever, all that certain portion, claim and mining right, title and property on those certain ledges, vein, lode or deposits of quartz and other rock in place, containing precious metals of gold, silver and other metals, and situated in the Summit Valley Mining District, County of Silver Bow, and State of Montana, and described as follows, to-wit: An undivided one-half ($\frac{1}{2}$) interest in and to the following quartz lode mining claims, to-wit: The "Gulf" quartz lode mining claim; the "Hope" quartz lode mining claim; the "Olivia" quartz lode mining claim; the "Rabbit" quartz lode mining claim,—all of said claims be situated in said Summit Valley (unorganized) Mining District in Silver Bow County, Montana, according to the Declaratory Statements of said claims now of record in the office of the County Clerk and Recorder of Silver Bow County, Montana.

Together with all the dips, spurs and angles, and also all the metals, ores, gold, silver and metal bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and en-

joyed; and also all the estate, right, title, interest, possession, claim and demand whatsoever, of the said parties of the first part, [1439] of, in or to the premises, and every part and parcel thereof.

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hand and seal the day and year first above written.

R. O. MERRIMAN.

Duly acknowledged by R. O. Merriman, before John N. Kirk, a Notary Public, on May 26, 1900.

Recorded in Vol. 42 of Deeds, Page 406, Nov. 30, 1900, records of Silver Bow County, Montana.

[Defendants' Exhibit No. 17—Mining Deed Dated December 16, 1910—Samuel Kift and Isaac D. Knoyle and Louis Mason and R. O. Merriman.]
[1440] (No. 443. In Equity. Defts. Exhibit No. 17. Oliver T. Crane, Examiner.)

MINING DEED.

THIS INDENTURE, Made the 16th day of December, in the year of our Lord nineteen hundred and ten, between Samuel Kift and Isaac D. Knoyle, parties of the first part, and Louis Mason and R. O. Merriman, parties of the second part, Witnesseth: That the said parties of the first part, for and in consideration of the sum of One (\$1.00) Dollars, lawful money of the United States of America, to them in hand paid, the receipt whereof is hereby acknowledged,

have granted, bargained, sold, remised, released, conveyed and quitclaimed, and by these presents, do grant, bargain, sell, remise, release, convey and quitclaim unto the said parties of the second part, and to their heirs and assigns forever, all the right, title and interest, estate, claim and demands of said parties of the first part, of, in and to that certain portion, claim and mining right, title and property on that certain ledge, vein, lode or deposits of quartz and other rock in place, containing precious metals of gold, silver and other metals, and situated in the Summit Valley Mining District, County of Silver Bow, and State of Montana, and described as follows, to-wit:

The Hornet quartz lode claim, situate, lying and being in Section 16, Township 3 North, Range 7 West, and lying northerly from the Bullwhacker lode claim, located March 19th, 1900, and recorded on page 384, Book "T," and page 213, Book "U," Lode Records of Silver Bow County, Montana.

Together with all the dips, spurs and angles, and also all the metals, ores, gold, silver and metal-bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereunto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all the estate, right, title, interest, possession, claim and demand whatsoever, of the said parties of the first part, [1441] of, in or to the premises, and every part and parcel thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances and priv-

ileges thereunto incident unto the said parties of the second part.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

SAMUEL KIFT. [Seal]

ISAAC D. KNOYLE. [Seal]

Duly acknowledged by Samuel Kift and Isaac Knoyle on Dec. 16, 1910, before Louis P. Sanders, a Notary Public.

Recorded at page 415 of Book 55 of Deeds, Records of Silver Bow County, Montana.

Filed and entered Apr. 17, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy.

[Defendants' Exhibit No. 18—Ore Statement Dated Butte, Montana, October 22, 1900.]

[1442] (No. 443. In Equity. Defts. Exhibit No. 18. Oliver T. Crane, Examiner.)

ORE STATEMENT.

MONTANA ORE PURCHASING COMPANY.

Butte, Mont., Oct. 22, 1900.

GULF ORE, For Account of D. L. Merriman.

Date Received Oct. 17; Lot 6653; Assay Copper per cent, 34.4; Gross Pounds, 2475; Moisture, per cent, 4.5; pounds, 108; Sacks No. 38, Lbs. 76; net tons 1.145; Price per ton, 68.68;

Total Value,	78.63
Less Sampling,	10.00

68.63

Washington-Butte Mining Company. 1753

Basis Settlement: 2.20 per unit for copper; less 7.00 per ton treatment.

R. A. CARNOCHAN.

MONTANA ORE PURCHASING CO.

Per BAGLIN.

Filed and entered Apr. 17, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy.

Defendants' Exhibit No. 19—Ore Statement Dated Butte, Montana, December 28, 1900.]

[1443] (No. 443. In Equity. Defts. Exhibit No. 19. Oliver T. Crane, Examiner.)

ORE STATEMENT.

MONTANA ORE PURCHASING COMPANY.

Butte, Mont. Dec. 28, 1900.

GULF ORE, For Account of Mason & Merriman.

Date Received, Dec. 23; Lot 6814; Assay, Silver Oz. 0.6; copper per cent, 8.8; Weight, gross pounds, 2007 $\frac{5}{8}$; moisture, per cent, 7.0; Pounds, 1405; Net Tons, 9.335; Price per Ton, 12.36; Total Value, 115.38.

Basis of Settlement: 2.20 Per Unit for Copper, Less 7.00 Per Ton Treatment.

W. D. WHEELER.

MONTANA ORE PURCHASING CO.

Per GEO. BAGLIN.

Filed and entered Apr. 18, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 20—Ore Statement Dated
Butte, Montana, November 17, 1900.]**

[1444] (No. 443. In Equity. Defts. Exhibit No.
20. Oliver T. Crane, Examiner.)

ORE STATEMENT.

MONTANA ORE PURCHASING COMPANY.

Butte, Mont., Nov. 17, 1900.

GULF ORE, For Account of Mason & Merriman.

Date Received, Nov. 12; Lot 6714; Assay, Silver Oz.
0.9; Copper per cent, 6.4; Weight, Gross Pounds,
17450; Moisture, per cent, 9.0; Pounds, 1571;
Net Tons, 7.939; Price per ton, 7.60; Total
Value, 60.33.

Basis of Settlement: 90 Per Cent of Silver at 64
per ounce. 2.20 Per Unit for Copper. Less 7.00
Per Ton Treatment.

BEN K. COSBY.

MONTANA ORE PURCHASING CO.

Per **GEO. BAGLIN.**

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 53—Assayer's Certificate
Dated Butte, Montana, December 20, 1911.]**

[1445] (No. 443. In Equity. Defts. Exhibit No.
53. Oliver T. Crane, Examiner.)

THE ROMBAUER ASSAY CO.,

Assayers and Chemists,

56 East Granite Street,

W. R. Hocking Manager, Butte, Montana.

Dec. 20, 1911.

C. C. Clark.

Samples Taken by E. E. Watson.

	SiO	Cu
1	85.4	1.95
2	85.3	3.00
3	87.5	2.3
4	84.71	3.2
5	69.5	9.5
6	95.5	.4
7	88.3	.45
8	85.9	2.85
9	89.9	.65
10	84.0	6.3
11	80.2	9.0
12	73.4	7.1
13	72.0	10.9
14	92.4	.7
15	89.1	2.2
16	86.8	2.05

Respectfully,

W. R. HOCKING.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

[Defendants' Exhibit No. 61—Bargain and Sale Deed Dated February 19, 1901—Louis Mason and Anna Mason and R. O. Merriman and Rachael A. Merriman.]

[1446] (No. 443. In Equity. Defts. Exhibit No. 61. Oliver T. Crane, Examiner.)

THIS INDENTURE, Made this 19th day of February, in the year One Thousand Nine Hundred and One, between Louis Mason and Anna Mason, his wife, and R. O. Merriman and Rachael A. Merriman, his wife all of the City of Butte, County of Silver Bow, State of Montana, parties of the first part, and L. O. Clark, of the same place, party of the second part, WITNESSETH.

That the said parties of the first part, for and in consideration of the sum of One Dollar, lawful money of the United States, to them in hand paid by the said party of the second part, and certain other valuable considerations contained in a separate agreement of even date herewith, do, by these presents, grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, and to her heirs and assigns forever, an undivided five-eighths ($\frac{5}{8}$) interest of, in and to the following described mining properties, to-wit, an undivided five-eighths interest in the "GULF" quartz lode mining claim; an undivided five-eighths interest of, in and to the "Hope" Quartz lode mining claim, an undivided five-eighths interest of, in and to the "Olivia" quartz lode mining claim; an undivided five-eighths interest of, in and to the "Rabbit" quartz lode mining claim;

and an undivided five-eighths interest of, in and to a certain agreement in writing, and lease and bond for the purchase of that certain quartz lode mining claim known as the "Hornet" quartz lode mining claim, which said lease and bond was executed on the second day of May, A. D. 1900, from Isaac Knoyle and Samuel Kift, as lessors, and running to the said Louis Mason and R. O. Merriman as lessees; it being the intention to convey by these presents an undivided five-eighths interest in all of the rights and title which now vests or may hereafter accrue in the said Louis Mason and R. O. Merriman of, in and to that certain quartz lode mining claim known as the "Hornet," by virtue of the said bond heretofore referred to.

All of which said lode mining claims are situated in Section [1447] Sixteen, Township Three North, Range Seven West, in Summit Valley Mining District, Silver Bow County, State of Montana.

Together with an undivided five-eighths interest in and to all the dips, spurs, and angles, and also all the metals, ores, gold, silver and copper bearing rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements and hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, her heirs and assigns, forever.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands this nineteenth day of February, A. D. 1901.

LEWIS MASON.

ANNA MASON.

R. O. MERRIMAN.

RACHAEL A. MERRIMAN.

(U. S. Revenue Stamps 50¢.)

Duly acknowledged. Filed for record and recorded Feb. 19, 1901, at page 54, of Book 47 of Deeds, Records of Silver Bow County, Montana.

Filed and entered Apr. 17, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 70—Assayer's Certificate
Dated Butte, Montana, June 2, 1903.]**

[1448] (No. 443. In Equity. Defts. Exhibit 70.
Oliver T. Crane, Examiner.)

GEORGE H. SEE,

Assayer and Chemist.

Butte, Montana, June 2, 1903.

Mr. John Stafford: Your 3 Hand Samples Assayed
as follows:

	Oz. Per Ton. Silver.	Per Cent. Copper.
No. 1 W. of incline 17 ft. W. of center	Trace	2.4
No. 2 18½ ft. E. of incline	1.04	5.94
No. 1 E. 7 ft. of Center of in- cline	trace	21.6

Charges \$3.00.

Respectfully submitted,

GEO. H. SEE,

Assayer.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 71—Assayer's Certificate
Dated Butte, Montana, December 16, 1911.]**

[1449] (No. 443. In Equity. Defts. Exhibit No.
71. Oliver T. Crane, Examiner.)

THE ROMBAUER ASSAY CO.,

Assayers and Chemists,

Butte, Montana, Dec. 16, 1911.

C. C. Clark: Your samples assayed as follows:

Samples Taken by John Stafford.

	Ozs. Silver Per Ton.	Per Cent. Copper.	Per Cent. Silica.
#1 10 ft. N of Hornet Shaft	0.5	56.96	23.4
#2 15 ft. “ “ “	0.5	49.16	33.5
#3 Mouth of 1st X-cut 18 ft. from discovery surface	0.2	15.92	63.1
#4 28 ft. from surface, Disc.	Tr.	5.70	79.2
#5 24 ft. N of Discovery shaft in X-cut	0.6	40.38	38.4

Respectfully,

W. R. HOCKING.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 72—Assayer's Certificate
Dated Butte, Montana, December 18, 1911.]**

[1450] (No. 443. In Equity. Defts. Exhibit No.
72. Oliver T. Crane, Examiner,)

THE ROMBAUER ASSAY CO.,

Assayers and Chemists,

Butte, Montana, Dec. 18th, 1911.

Mr. C. C. Clark: Your Sample Assayed as follows:

Samples Taken by John Stafford.

		Per Cent Copper.	Per Cent Silica.
#1	Rabbit Disc. Shaft 11 ft. from surface,	15.40	47.4
#2	Rabbit Tunnel foot-wall streak about 1 ft. wide	11.30	65.5
#3	Rabbit Tunnel 33 ft. from 1st cross-cut	2.39	89.1

Respectfully,

W. R. HOCKING.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 89—Assayer's Certificate
Dated Butte, Montana, December 18, 1911.]**

[1451] (No. 443. In Equity. Defts. Exhibit No.
89. Oliver T. Crane, Examiner.)

THE ROMBAUER ASSAY CO.,

Assayers and Chemists,

W. R. HOCKING, MGR.

Butte, Montana, Dec. 18th, 1911.

Mr. Sam Barker: Your Samples Assayed as follows:

	Ozs. Silver per ton.	Per Cent Copper.
#1 Sample of Streak at bot- tom of Hornet disc. shaft	.1	.44
#2 Sample from XCut North from bottom of Hornet Disc. Shaft	.3	1.70

Respectfully,

W. R. HOCKING.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 114—Assayer's Certificate
Dated Butte, Montana, February 2, 1912.]**

[1452] (No. 443. In Equity. Defts. Exhibit No.
114. Oliver T. Crane, Examiner.)

THE ROMBAUER ASSAY CO.

Assayers and Chemists.

W. R. HOCKING, MGR.

Butte, Montana, Feb. 2nd, 1912.

Clark & Mason, by P. A. Stevens.

	Ozs. Silver.	Per Cent. Copper.	Per Cent. Iron.
# 0	0.1	0.12	7.9
#00	0.1	0.16	7.4
# 1	0.1	trace	29.1
# 2	0.1	0.10	28.8
# 3	0.1	0.27	24.1
# 4	0.5	14.55	
# 5	0.1	1.26	
# 6	0.3	9.51	
# 7	0.4	8.25	
# 8	0.4	8.70	
# 9	0.3	6.48	
#10	0.1	1.60	
#11	0.1	1.20	
#12	0.1	2.08	
#13	0.1	2.64	
#14	0.2	6.37	
#15	0.2	5.45	
#16	0.1	2.50	
#17	0.2	6.94	

Respectfully,

W. R. HOCKING.

Filed and entered Apr. 17, 1912. Geo. W. Sproule,
Clerk. By Harry Drumm, Deputy.

**[Defendants' Exhibit No. 117—Report on the
Bonanza and Hidden Creek Copper Properties,
by Horace Winchell, Butte, Montana, December,
1902.]**

[1453] (No. 443. In Equity. Defts. Exhibit No.
117. Oliver T. Crane, Examiner.)

**REPORT ON THE BONANZA AND HIDDEN
CREEK COPPER PROPERTIES.**

**BY HORACE WINCHELL, BUTTE, MONTANA,
DECEMBER, 1902.**

HIDDEN CREEK.

The Hidden Creek property is situated less than two miles from deep water, is surrounded by timber of great growth, near a fine water power, and has an elevation of about 750' above tide.

The ore stands up in bold outcrops and for some time could be quarried and mined in open cuts or benches very cheaply. The ore on the surface is sometimes hard, indeed very solid chalcopyrite and pyrrhotite, and again soft rotted and crumbling granular pyrite, fresh and yellow and but little oxidized.

The developments upon this property at the time of my examination were extremely limited, and the description has reference chiefly to the surface showing. There is a dike of green stone associated with the ore at the Hidden Creek, and it is altogether likely that other dikes occur which were not noticed on the surface. The dike noticed strikes south 20 deg. west, magnetic, dips east about 55 degs., and is

[1456] BONANZA.

LOCATION.

The Bonanza property is situated about half a mile from the Coast of Goose Bay, Observatory Inlet, in British Columbia, just south of the southeastern portion of Alaska. The claims included in this property are the "North Star," "Moana," "Emma," "Bonanza" and "Louis Fraction." These claims are not all full claims. There is also a location on the beach called the "Margaret." The elevation at the property is about 125' above tide. Water power can be developed in abundance from two streams of fresh water called "Mineral Creek" and "Bonanza Creek."

The country is heavily timbered with hemlock, spruce, balsam and cedar; and conditions for operating and economic mining throughout the year could not be improved upon.

GEOLOGY.

The country rock is mica-schist and gneiss, containing dykes of diabase and diorite. The country is much broken and the streams occupy deep gorges. The rocks show recently glaciated and very fresh surface exposures, although schists are much brecciated and altered. Sulphides of iron and copper are frequently seen on the very surface and in the beds of streams, although there is occasionally a surface capping of from a few inches to a foot of oxide of iron, in the shape of gossam. Below this are found solid pyrite, pyrrhotite and chalcopyrite. These minerals are sometimes quite massive in occurrence near the surface, the iron sulphides largely predominating, and are sometimes disseminated in small particles

through the schists.

The crushed, twisted and brecciated schists lie adjacent to the dikes of diabase and diorite and carry the ore which occupies the intestices and cracks between the masses of schist and quartz. These included masses of quartz and rock, are sometimes angular and [1457] sometimes rounded and bear evidences of considerable squeezing and movement. The ore appears to be richer near the surface and to follow the slope of the hills rather than any structural features of the rocks.

A careful observation of the sulphides of iron and copper in the gorges around and upon the Bonanza property makes it perfectly evident that the copper ore is due entirely to superfical concentration, and unless in association with dikes of eruptive rocks, cannot be expected to extend to any considerable depth. Climatic topographic and geological conditions all tend to prevent the concentration of the copper ore in depth, and the formation of rich deposits at any considerable distance below the surface. In fact, most of the tunnels upon the Bonanza property have run through the ore and into solid, almost barren rock at very moderate depths. Sketches of tunnels Numbers 1, 2 and 3, appended to this report, demonstrate the correctness of these statements.

Ore to the amount of perhaps 250 tons has been taken from these workings and thrown on the dumps. This ore might average 6 per cent in copper, and, if present in large quantity, could be mined and treated at a profit. It is evident from the developments, however, that the quantity of such ore is very limited, and the indications are not sufficiently

including the volume to which this certificate is attached, is, within the time allowed by law and the rules of Court and the extensions of time granted by the Court, approved as a true, complete and properly prepared statement of all of the evidence offered and introduced upon the trial and hearing of said case, including all exhibits, excepting maps and tracings, the originals of which the clerk is directed to transmit to the Clerk of the Circuit Court of Appeals; and also excepting the mineral specimens, which are also to be transmitted to the appellate court, at appellants' expense.

Dated this 3rd day of October, 1913.

FRANK S. DIETRICH,
Judge.

Filed October 8th, 1913. Geo. W. Sproule, Clerk.

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

[1460] I, Geo. W. Sproule, Clerk of the District Court of the United States, in and for the District of Montana do HEREBY CERTIFY: That the foregoing Transcript on Appeal, in the case of Washington-Butte Mining Company, a Corporation, Complainant and Respondent, against Louis Mason et al., Defendants and Appellants, contains a full, true and correct copy (formal parts only omitted) of all pleadings filed in said case, to wit: The Bill of Complaint, Answer of Defendants, Answer of Washington-Butte Mining Company to Cross-Bill of Defendants, Replication to Defendants' Answer, Replication to Paragraphs One to Five Inclusive of

Complainant's Answer to Defendants' Cross-Bill, Exceptions to Portion of Complainant's Answer to Cross-Bill, Judgment and Decision of Court Sustaining Exceptions to Portions of Complainant's Answer to Cross-Bill, Except as to Paragraphs 6, 17 and 20 of said Answer to Cross-Bill, and Overruling said Exceptions as to said Paragraphs 6, 17 and 20; and Supplemental Answer of Defendant L. P. Forestell; also Decree of the Court, and Decision of the Court; Petition for Appeal and Allowance, Assignment of Errors, Bond on Appeal and Original Citation on Appeal; also a full, true and correct copy of the Transcript and Statement of the Evidence as settled and allowed by the Judge presiding, and of the certificate of approval by said judge, and of all exhibits, excepting maps and tracings and mineral exhibits, the originals of which will be transmitted to the Clerk of the Circuit Court of Appeals as provided by the rules, and in accordance with the direction of the trial Court.

And I further certify that the foregoing Record was prepared by the Appellants, at their own expense, and that Two hundred and nineteen 65/100 Dollars, is the cost of comparing the said record, and that said amount has been paid to me by Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the [1461] seal of this court this 8th day of October, in the year A. D. 1913.

[Seal]

GEO. W. SPROULE,

Clerk of the District Court of the United States, in
and for the District of Montana.

[Endorsed]: No. 2323. United States Circuit Court of Appeals for the Ninth Circuit. Louis Mason, L. O. Clark, Johanna Farlin, C. C. Clark, L. P. Forestell, A. F. Bushnell, John Dolan, Pat Lerous, J. T. Fitzgerald and Elizabeth Brown, Appellants, vs. Washington-Butte Mining Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Received and filed October 14, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

LOUIS MASON et al.,

Appellants,

vs.

WASHINGTON-BUTTE MINING COMPANY,

Appellee.

**Petition [for Order Extending Time to Docket
Cause in Appellate Court].**

Come now the above-named appellants and petition the Court for an order extending the time in which to docket the above-entitled case with the Clerk of the above-entitled court, for the reason that the narrating and settling of the testimony to be used on the appeal of the above-entitled cause has consumed

an extraordinary amount of time and necessitated unusual labor, and by reason thereof, appellants will be unable to docket said cause on the date fixed in the citation, to wit, July 30, 1913.

And your petitioners will ever pray.

WALSH, NOLAN & SCALLON,
Solicitors for Appellants.

[Endorsed]: No. 2323. U. S. Circuit Court of Appeals, Ninth Circuit. Louis Mason et al., Appellants, vs. Washington-Butte Mining Company, Appellee. Petition. Filed Jul. 24, 1913. F. D. Monckton, Clerk. Refiled October 14, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

LOUIS MASON et al.,

Appellants,

vs.

WASHINGTON-BUTTE MINING COMPANY,
Appellee.

**Order [Enlarging Time to August 30, 1913, to File
Record Thereof and to Docket Cause in Appel-
late Court].**

On reading and filing the petition of the above-named appellants this day filed herein, praying an enlargement of the time in which to file a record of the above-entitled cause and docket the case with the Clerk of this Court, for good cause shown;

IT IS ORDERED: That the time in which the above-named appellants shall file a record of the

above-entitled cause and docket the case with the clerk of this Court at San Francisco, California, be, and the same hereby is, enlarged and extended to and including the 30th day of August, 1913.

Dated July 24, 1913.

By the Court:

WM. W. MORROW,

U. S. Circuit Judge.

[Endorsed]: No. 2323. U. S. Circuit Court of Appeals, Ninth Circuit. Louis Mason et al., Appellants, vs. Washington-Butte Mining Company, Appellee. Order. Filed Jul. 24, 1913. F. D. Monckton, Clerk. Refiled Oct. 14, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

LOUIS MASON et al.,

Appellants,

vs.

WASHINGTON-BUTTE MINING COMPANY,

Appellee.

**Petition [for Further Extension of Time to Docket
Cause in Appellate Court].**

Now come the above-named appellants and petition the Court for an order further extending the time in which to docket the above-entitled case with the Clerk of the above-entitled court, for the reason that the approval of the statement of the evidence in said cause cannot be secured in such

time as to make possible the docketing of said cause within the date now fixed, to wit, August 30, 1913.

And your petitioners will ever pray.

J. A. POORE,

WALSH, NOLAN & SCALLON,

Attorneys for Appellants.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

LOUIS MASON et al.,

Appellants,

vs.

WASHINGTON-BUTTE MINING COMPANY,

Appellee.

**Affidavit [of C. B. Nolan in Support of Petition for
Extension of Time to Docket Cause in Appel-
late Court].**

C. B. Nolan, being first duly sworn, upon oath, deposes and says: That he is one of the attorneys for the appellants in the above-entitled cause; that in said cause, on the 30th day of June, 1913, an appeal was allowed to the above-entitled court; that contemporaneous with the allowance of said appeal, a statement of the evidence reduced to narrative form was filed with the Clerk of the District Court of the District of Montana, where said cause was tried, and a copy thereof, at said time, was served upon the attorneys for appellee; that the statement, so prepared, was voluminous, containing in the neighborhood of twelve hundred typewritten pages of testimony, and the statement so prepared was a condensation of testimony by question and answer

of over thirty-six hundred pages; that upon the deposition of said statement with the Clerk, a notice was served upon the attorneys for appellee that said statement should be presented for allowance on the 24th day of July, 1913; that within the time named, the appellee presented amendments to the statement so submitted, which appellants object to.

Affiant further says that Judge Bourquin, now the judge of said court, was one of the attorneys who tried said cause, and is disqualified from acting therein; that on the 8th day of August, 1913, an order was duly made in the United States District Court, setting forth the fact that the presiding Judge of said court was disqualified, and thereupon on said date a communication was addressed to the Hon. William B. Gilbert, one of the Circuit Judges of the Ninth Circuit, advising him of the disqualification of said judge.

Affiant further says that the Hon. Frank S. Dietrich, Judge of the District Court of Idaho, tried said cause, and as affiant is informed, has been designated to approve said statement, and that the statement, with the amendments, was forwarded to him at Boise City, Idaho, on the 14th day of August, 1913; that the consideration of said statement may consume considerable time, and affiant believes that the said statement will not be settled and allowed in seasonable time, so that said cause can be docketed with the Clerk of the Circuit Court of Appeals on or before the 30th day of August, 1913, which is the time now fixed within which said cause should be docketed.

Washington-Butte Mining Company. 1777

Affiant further says that if said Judge Dietrich promptly takes up the matter of the allowance of said statement, an extension of time to the 30th day of September, might suffice, but, realizing that some little time may occur in connection with the settlement and allowance of said statement, affiant believes that an extension of time in which to docket said cause should be granted up to and including the 15th day of October, 1913.

And further affiant saith not.

C. B. NOLAN.

Subscribed and sworn to before me this 16th day of August, 1913.

[Seal]

J. R. WINE, Jr.,

Notary Public for the State of Montana, Residing at
Helena, Montana.

My commission expires Nov. 13, 1914.

[Endorsed]: No. 2323. U. S. Circuit Court of Appeals, Ninth Circuit. Louis Mason et al., Appellants, vs. Washington-Butte Mining Co., Appellee. Petition and Affidavit. Filed October 14, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

LOUIS MASON et al.,

Appellants,

vs.

WASHINGTON-BUTTE MINING COMPANY,
Appellee.

**Order [Extending Time to October 15, 1913, to
Docket Cause in Appellate Court].**

On reading and filing the petition of the above-named appellants this day filed herein, and considering the affidavit upon which the petition is based, said petition praying for a further extension of time in which to file and docket said cause with the Clerk of said Court, and good cause being shown;

IT IS ORDERED, That the time in which said cause shall be filed and docketed with the Clerk of this Court at San Francisco, California be, and the same is hereby, extended to and including the 15th day of October, 1913.

Aug. 25, 1913.

By the Court:

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: No. 2323. U. S. Circuit Court of Appeals, Ninth Circuit. Louis Mason et al., Appellants, vs. Washington-Butte Mining Co., Appellee. Order Under Rule 16 Enlarging Time to Oct. 15, 1913, to File Record Thereof and to Docket Case. Filed Aug 25, 1913. F. D. Monckton, Clerk. Re-filed Oct. 14, 1913. F. D. Monckton, Clerk.

No. 2323.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS MASON, L. O. CLARK, JOHANNA
FARLIN, C. C. CLARK, L. P. FORE-
TELL, A. F. BUSHNELL, JOHN
DOLAN, PAT LEROUS, J. T. FITZ-
GERALD AND ELIZABETH BROWN,
Appellants,

vs.

WASHINGTON-BUTTE MINING COM-
PANY, a Corporation,
Appellee.

BRIEF OF APPELLANTS.

WALSH, NOLAN & SCALLON,
and
J. A. POORE,
Solicitors for Defendants and Appellants.

Filed February 10 1914.

FILED

FEB 10 1914

Clerk.

No. 2323.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS MASON, L. O. CLARK, JOHANNA
FARLIN, C. C. CLARK, L. P. FORE-
TELL, A. F. BUSHNELL, JOHN
DOLAN, PAT LEROUS, J. T. FITZ-
GERALD AND ELIZABETH BROWN,
Appellants,

vs.

WASHINGTON-BUTTE MINING COM-
PANY, a Corporation,
Appellee.

BRIEF OF APPELLANTS.

WALSH, NOLAN & SCALLON,
and
J. A. POORE,
Solicitors for Defendants and Appellants.

No. 2323.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS MASON, ET AL.,

Appellants,

vs.

WASHINGTON-BUTTE MINING COM-
PANY, a Corporation,

Appellee.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal by the defendants (appellants) from the decree entered by the District Court of the United States, for the District of Montana, on the 4th day of January, 1913.

On May 11, 1910, the Appellee filed its bill of complaint in the United States Circuit Court for the District

of Montana, for the purpose of quieting its title as against the appellants to a certain portion of the Butte and Boston Placer, described in the complaint (Tr. p. 3). The appellants filed their answer to said complaint, denying the appellee's right or claim to any portion of the ground described included within the boundaries of the Hornet, Gulf, Olivia, Hope and Rabbit quartz lode mining claims, and claiming that at the time of the location of the Butte and Boston Placer, and at the time of the application for patent therefor, veins of quartz were known to exist in the ground, and were by the terms of the patent excluded therefrom.

On April 1, 1890, Chas. S. Passmore and Levi J. Hamilton located a portion of the ground in controversy as the Pleasant View (Tr. p. 1726), and Point Pleasant (Tr. p. 1729), quartz lode claims; and on the 16th day of April, 1891, Louis Mason acquired an interest therein (Tr. p. 1732).

On December 20, 1890, and while the Point Pleasant and Pleasant View quartz claims were valid and existing locations, Simeon V. Kemper and others located the Butte and Boston Placer, covering a portion of the ground included within the Point Pleasant and Pleasant View locations, and on May 11, 1891 (Tr. p. 1711), made application for patent therefor, which was issued Dec. 19, 1895 (Tr. p. 58, 1713).

Shortly after the application for patent of the Butte and Boston Placer was made, the owners of the Point

Pleasant and Pleasant View quartz claims commenced an adverse suit, and the matter was compromised by the quartz claimants permitting the placer applicant to take judgment and go to patent, in consideration of the placer owners conveying to the quartz owners the east ten acres of the ground included within the placer patent (Tr. p. 93).

The Gulf, Rabbit, Hope, Oliva and Hornet quartz lode claims were located by the predecessors in interest of appellants on May 1, 8, 13, 16 and 19th, 1900, respectively (Tr. pp. 88, 1742, 1745, 1738, 83), covering a portion of the ground in controversy.

The appellants contend:

(1) That the Butte and Boston placer location was void as to that portion thereof of which was included within the Point Pleasant and Pleasant View quartz locations, and that portion of the ground was public domain at the time of the location of the Gulf, Rabbit, Hope, Oliva and Hornet lode claims, and is now the property of the quartz claimants.

(2) That at the time of the application for patent for the Butte and Boston Placer, there were known lodes and veins upon the ground, which were excepted from the placer patent, and are included within the appellants' Gulf, Rabbit, Hope, Oliva and Hornet quartz locations.

SPECIFICATION OF ERRORS.

1. The District Court of the United States, in and for the District of Montana, erred in rendering and entering a decree herein, in favor of the appellee and against the appellants.

2. Said Court erred in holding and finding and decreeing accordingly that the land embraced in the placer patent for the ground in controversy was, at the time of the issuance of said patent, a part of the public domain which the Government had the power to sell and dispose of.

3. The said Court erred in holding and finding and decreeing accordingly that there were no such disclosures or evidence, as would justify a holding that there were veins or lodes, the existence of which was known prior to the application for placer patent, in any part of the ground in controversy.

4. The said Court erred in not holding and finding and decreeing accordingly that there were veins and lodes known to exist within the boundaries of the ground in controversy, to which a placer patent had been issued, prior to May 11, 1891, the date of application for placer patent to said ground.

5. The said Court erred in not holding and finding and decreeing accordingly that prior to, and at the time of the application for the placer patent to the premises in controversy, a portion of said premises was embraced in valid existing lode claims, and as to the conflicting area the patent was therefore void.

6. The said Court erred in not holding and finding and decreeing accordingly that the appellants, at the time of the commencement of said action and prior thereto, were the owners and entitled to the possession of the ground embraced within the lode claims which conflicted with the ground covered by the placer patent, and in controversy herein.

STATEMENT OF THE EVIDENCE.

LOUIS MASON, one of the appellants, testified that he is a man 50 years of age and has lived in Silver Bow County since 1887. He has had a great deal of experience in mining (Tr. pp. 68-69). To the knowledge of the witness the ground in controversy was located about the first of April, 1890, as the Point Pleasant and Pleasant View lode mining claims (Tr. p. 70). The corners of the claims were marked with mounds of stone and notices were placed at the discovery shafts. The claims were six hundred feet wide and fifteen hundred feet in length, and overlapped each other to some extent. In the case of the Pleasant View location, the discovery was about the center of the claim, and in the Point Pleasant it was near the east end line (Tr. p. 71). The notices of location of these claims were introduced in evidence and are marked Defendants Exhibits 2 and 3. (Tr. pp. 1726-1729). On the 16th of April, 1891, the witness acquired an interest in these

claims (Tr. pp. 1732-1734), and about the 17th or 18th of April, 1891, went upon the ground for the purpose of doing work (Tr. p. 73). "The first work I did was to sink a little shaft on the Point Pleasant about 300 feet east of the Boston Placer * * * and in sinking it I found pieces of copper ore, but no lead. I did not go to bed rock. The next work was about 1500 feet in an easterly and 100 feet in a southerly direction from the north side line of the Butte and Boston placer, and about 100 feet in a southerly direction from the south end line of the Copper Queen lode, and within the boundaries of the Point Pleasant location, marked on the map as No. 1. That shaft was about 4 feet square, sunk to a depth of about 14 feet, and bedrock there was within 7 or 8 feet of the surface, and from the time I struck bedrock until I reached the bottom, I had good vein matter, and I have ore from that same place at the present time taken out in 1891, from the shaft marked No. 1 on the Pleasant View. (Ore marked defendants' Exhibit 5). This cut No. 1 was examined by me before the 11th of May, 1891. The material that came out of this shaft was piled on the dump, and is of such a size that it can be readily seen for a distance of a quarter of a mile. I had two assistants, Eli Rea and Grant Pore." (Tr. pp. 73-74). He then testified that prior to May, 1891, he went about 40 feet in an easterly direction and sunk another shaft about $3\frac{1}{2}$ or 4 feet square, to a depth of 12 or 14 feet, designated on the map as No. 2. He

got to bedrock in about 7 feet, and encountered lead material as he came to bedrock, and was constantly in lead material. Defendant's Exhibit 6 came from this shaft (Tr. p. 75). Prior to May 11, 1891, he sunk a third shaft on the Point Pleasant claim, about 125 feet in an easterly direction from Shaft No. 2, which shaft was about $3\frac{1}{2}$ feet square and about 28 feet deep. The bedrock at that point was about 8 feet below the surface. He encountered a lead after reaching bedrock, and sunk on the lead about 16 or 18 feet (Tr. p. 75). Prior to May 11, 1891, he also sunk a shaft on the line between the Point Pleasant and Pleasant View lodes, known as the Hornet shaft, which was about 4 feet square and 33 feet deep. Bed rock was encountered in about 14 feet. He found copper ore in bodies all along down the shaft. The vein disclosed in the shaft extended throughout the entire shaft, and a sample of the material is marked Defendants' Exhibit 8. (Tr. pp. 76-77).

Representation work was done upon the Point Pleasant and Pleasant View quartz claims for the years 1892, 1893, 1894 and 1895.

On the 13th of March, 1895, Lee Davenport located the Lynne quartz claim (Tr. pp. 79-80), covering the same ground, and what is now known as the Hornet shaft, and which was sunk in May, 1891, was used as the discovery. At that time the vein was in sight and the discovery was easily made. (Tr. p. 77). He transferred an interest to Mr. Mason, and it was represented until 1897 (Tr. p. 82).

Samples, marked Defendants' Exhibits 8, 9 and 10, were taken by the witness from this Hornet shaft (Tr. p. 77), and in the opinion of the witness this ore exists in quantities sufficiently large to pay for operating (Tr. p. 78).

The witness further testified (Tr. p. 78): "Having in mind the discoveries upon the Pleasant View and Point Pleasant, and before I did any work on the ground at all, and having in mind the location of the ground with reference to claims contiguous to it, I would judge by the surface indications,—quartz float found all over the principal part of the ground, and the pieces of rich copper float found promiscuously over the surface of the ground and the adjoining claims on which work was done prior to the location of this ground, that there was sufficient evidence on the ground, and from the surroundings, to warrant any man in prospecting and developing the ground for quartz. As a result of the work I did there prior to May 11, 1891, I discovered well-defined leads." "The reason I did not take out the mineral from these exposures and ship it prior to 1895 is that the ground was in litigation up to that time between Mr. Kemper and his partners and myself and my partners. After 1895, when there was a settlement of that litigation, I obtained a lease and bond from my other partners, and we sank this shaft known as the two compartment shaft to a depth of forty-eight feet, and timbered it with 8x8 timbers. At that depth we encountered water and could not get

any farther, and I was not able to put up machinery; we had to quit." (Tr. p. 93). However, the witness and Mr. Merriman encountered merchantable ore in the Hornet lead in 1901, and shipped it, and Defendants' Exhibits 18, 19 and 20 show the returns from these shipments (Tr. p. 94; Tr. pp. 1752-3-4).

The compromise referred to by the witness resulted in the placer owners transferring to the quartz owners the east ten acres of the placer ground after the patent was issued (Tr. p. 93).

The witness also tested the ground in controversy for placer in 1895, and failed to find a color or trace of placer gold, and this test was made in the "discovery" made by Mr. Kemper (Tr. p. 96).

P. C. DEAN testified that he was on the ground in controversy at the time Mason was working there in 1891; went down the shafts; it was in the early Spring, perhaps prior to the middle of April, and at that time the shafts were being sunk. There was ore on the dump of the shaft now known as the Hornet, and at that time it was about 18 feet deep. The ore looked like good copper ore, red oxide and carbonate. It was a prospect that would justify any man in locating it and prosecuting work upon it. (Tr. pp. 114-115).

ROBERT MERRIMAN, a practical miner, and the person who located the Rabbit, Hope, Oliva and Gulf quartz claims, testified on behalf of the defendants:

"The ground was covered with wash, but there was some old holes there that showed the vein. The vein at that point does not come to the surface. One of those holes in which I saw the vein was right close to the Rabbit discovery, I think it was about 7 or 8 feet, and there were several others up the hill, and other workings. In my judgment there was a lead visible in those old holes. I took it for a lead. As near as I can remember, the Rabbit discovery was about 12 or 14 feet deep and perhaps 4 feet wide and eight feet long, something like that, and there was a nice looking vein uncovered, and it was of such a character that a reasonable miner would be justified in locating the ground and prosecuting work there as mentioned, in the development of the property." (Tr. p. 136). The witness also testified: "*I made a discovery upon the Gulf claim. The reason that I located that point for a discovery was that the same old workings showed a vein there where I concluded to make this Gulf discovery. It seemed to me that the Gulf and Hope shafts are about 12 or 15 feet apart. The Gulf discovery was about 4 feet by 8 feet and something like 14 feet deep, I think. We got some merchantable copper ore out of the discovery, some of which we shipped. I got something over two hundred dollars for the ore that I got out of that hole, which possesses the dimensions that I have just given. The character of the ore was green chloride and I encountered a lead in that discovery. The indications were such that a reasonable*

miner would be justified in locating the ground and prosecuting work there." He also made a discovery in the Hope and Oliva claims. He testified that the reason he expected to find a lead in the Oliva discovery was "there was a lead exposed in some old workings that had been thrown out" and in sinking the shaft they discovered a lead that was covered in the old workings. (Tr. pp. 136 to 139.)

He continued to work the property until he was enjoined. Tunnel 34 was run by him so that he could take out the ore without hoisting it through the Gulf shaft. "We drove that tunnel quite a way in slide before we got to the lead. After striking the vein, we followed it something like 150 feet north. We took out of the tunnel merchantable copper ore and shipped it, and the returns more than paid the expenses involved in getting it out." (Tr. p. 139.)

"There were lots of dumps and holes on this ground when I became acquainted with it in 1900, and there was ore on a great many of the dumps." (Tr. p. 140.)

"In my judgment the lead that I followed in this tunnel (34) was a well-defined lead. It has one good wall that we followed all the way with the tunnel. My observation of it was that the course of the lead was a little south of east and north of west; where we found it the course was regular." (Tr. p. 141.) "Passing to the lead in the Point Pleasant ground,—the upper lead,—I went into one of those old openings in 1900 and in that opening I saw a quite well defined lead. That opening would be somewhere close to the Rabbit dis-

covery.” (Tr. p. 143.) “Along this placer ground I think that all the openings that I have spoken about on the northerly lead encountered the same lead in this course east and west; that is the way it looks to me; I should judge that all the openings and tunnels about which I have testified, on the southerly lead, were on the same vein. To my knowledge in 1900 there were two veins in this placer ground running east and west.” (Tr. p. 143.)

There was no placer gold in the ground (Tr. p. 147).

P. A. STEVENS, testified: That he was familiar with the ground in controversy, and has also worked adjoining ground. He operated the Bullwhacker and shipped approximately ten thousand tons of ore which paid expenses and yielded a profit (Tr. pp. 153-4). He did not know of any placer mining operations being carried on within a mile of the ground in controversy (Tr. pp. 154 and 167).

“The miner is generally able without uncovering the lead for its entire length, to determine the strike of it by the openings where there are tunnels or shafts. By taking the course of the veins through the bottom of each hole, and lining up the holes on the surface, is generally the way I tell if a lead exists between those openings where they are 50 or 100 feet apart. I do not know of any mines in this district where the lead has been uncovered throughout the entire distance of 1500 feet to determine its strike. There is a measure of regularity in the strike of a lead.” (Tr. p. 155.)

The witness testified that he examined shaft No. 1, the Rabbit, and in his opinion a lead was exposed there. The streak of ore lying in the bottom enabled him to determine the course of the lead, which is easterly and westerly. He procured a sample of the lead matter, which was received in evidence as Defendant's Exhibit 30. (Tr. p. 156.) He also examined shaft No. 2, and found in that shaft the evidence of a lead, having an easterly and westerly strike, the same as in shaft No. 1, and obtained a sample from there, which was received in evidence as Defendants' Exhibit 31. He then examined the Rabbit discovery. He made an examination of that shaft and ascertained that there is a lead in the bottom of that shaft, and procured a sample, received in evidence and marked Defendants' Exhibit 32. (Tr. p. 158.) He then went to shaft No. 9, a two-compartment timbered shaft. He encountered the lead in the cross cut, and the lead contained commercial ore; ore that would pay to ship; the body of ore was three or four feet wide. He took a sample of the vein from the solid formation, which was received in evidence and marked Defendants' Exhibit 33. He then examined the Rabbit tunnel, marked No. 31, and found a lead of ore exposed in the crosscut running north; its strike could be seen very plainly and was easterly and westerly, and in the main tunnel he also saw the same lead, and followed the lead for a distance of thirty or forty feet on its course east and west. He took a sample of the lead matter, which was received in evidence and marked Defend-

ants' Exhibit 34. (Tr. p. 159-160.) He also encountered a lead in the Hornet tunnel, which was continuous for a distance of about 100 feet, and he there saw a well-defined foot wall. He went down the Hornet shaft and saw the lead there, and also the hanging wall (Tr. p. 161). From these leads he took samples, which are marked Defendants' Exhibits 35, 36, 37, 38 and 39 (Tr. pp. 162-164). He then went on the surface, and from his examination, and lining up the several openings, it was his opinion the several veins exposed constituted the same lead (Tr. p. 165).

H. J. MASON testified for the defendants to the effect that he became acquainted with the ground in controversy in April, 1891. He visited the ground at that time when his brother, Louis Mason, and others were working upon the Point Pleasant and Pleasant View locations. "When I went upon the ground in the first place I knew of the existence of two quartz locations on the ground there known as the Pleasant View and Point Pleasant locations. With reference to the two leads,—northerly and southerly,—I noticed a shaft probably twenty feet deep on the northerly edge of the land on this northerly lead so called. The other was a shaft probably a little deeper on the south side of the ground near the south line. There were three shafts on the ground when I first visited it that I know of. There might have been more, but I know there were three. One was on the northerly lead and one exposed ore on the southerly lead. I did not notice

any ore in the other, it was far down the hill. I noticed that that shaft that I saw there in 1891 was still in existence when I was out there yesterday. It was in an advanced condition yesterday from what it was when I saw it before. It has been timbered up. When I was on the ground in 1891, the men were working this lower shaft at the lower part of the ground. There was nobody working on this shaft on the northerly lead when I was there the first time. There is quite a little dump around that shaft and it was of such proportions that any person going upon the ground and using his eyes could readily see it. In that shaft I saw green copper ore, red oxide of copper, and copper and such rock as could be called lead matter." (Tr. p. 183.) "Coming to the south lead, I saw men working just a little below, farther down the hill, west of the Hornet shaft. The Hornet shaft was in existence at the time, that is prior to May 11, 1891. There were two men working at that shaft at that time. There was considerable of a dump at that shaft and on it I saw evidence of mineralization in the form of copper ore, quartz, red stain, and iron quartz. At that time I went down in the Hornet discovery for the purpose of determining whether there was a lead exposed and I saw what I could call a lead on the north side of the shaft near the bottom and also on the west and east sides of the shaft. Noticeable characteristics of the lead or the matter that I saw there was the green copper and the red oxide of copper. *There was also*

some sacks of ore that they had sacked up laying on the dump and also ore scattered over the dump that they had taken out. I examined the ore in the sacks to determine if it were merchantable and found that it was very good ore,—commercial ore. Those sacks were plainly visible to anybody who wanted to see them.” A reasonable mining man would be justified in locating the ground and spending money in its development. (Tr. p. 185.)

SAMUEL T. JONES, a practical miner, testified for the defendants as follows: “I was first on the ground prior to the 11th of May, 1891. There was work being done there at the time. * * * There were two or three openings upon that ground before the first of May, 1891. I think about three shafts were being sunk at that time (Tr. p. 197). These shafts were sunk on what has been referred to as the north lead. I believe that there was one shaft being sunk on the southerly lead, known as the Hornet discovery lead, down beyond the west side of the ground. There were men working on the ground about the first of May when I was down there. I went out there pretty nearly every day, for three or four days. * * I went down into the so-called Hornet discovery and saw evidence of a lead there. It was good looking copper ore to me. They had some ore sacked up on the dump on the Hornet discovery, and in the light of my present knowledge of ore I would say that the ore

in the sacks was commercial ore. This ore in those sacks was prior to May 11th, 1891."

ERNEST WATSON, a mining engineer, testified for the defendants, that he had made an examination of the ground in controversy, and as a result of his examination and observation he would say there are two leads upon the ground. For the purpose of reference and identification, he called them the northerly and southerly leads (Tr. p. 205).

He testified that in the north cross-cut of tunnel 31, there is a lead, which he encountered about 20 feet from the point the cross-cut leaves the tunnel. Since he first visited the ground, the cross-cut has been extended about six feet, which extension shows ore for nearly its entire length (Tr. p. 206). He took a sample from this lead which assayed 10.9 per cent. copper for a width of one foot. "There is a foot wall shown there, and I would not say there is a hanging wall because the face is yet in ore." He also obtained a sample from the same place, and within the foot streak which he had assayed, which was introduced in evidence, and marked Defendants' Exhibit 40. He termed it chrysocolla with some carbonate or malachite in it, and stated that it is the character of material one would encounter in the oxidized zone of copper leads. The sample is rich in copper ore. (Tr. p. 207.) And at page 208 he testified: "I did not take a sample of the material disclosed in the new work (referring to the extension

of the north cross-cut of tunnel 31), but its character would compare favorably with the sample I took before Defendants' Exhibit 40). I would say that the foot wall is continuous in that cut as I saw it to the end of the cut, that is, it is not one solid body, but it is more or less broken up, with stringers of ore. I would say that in its entirety it is lead matter. The entire lead shown probably assays very little less than ten per cent. The entire body as it exists there in that cut I think is commercial ore." (Tr. p. 208.)

"Proceeding from this tunnel 31, the ore showed continuously on the north side and in the bottom of the tunnel where it is left, until you get 57 feet from this north cross-cut, there is a north and south fault comes in there." (Tr. p. 209.) "Going further beyond this fault in tunnel 31 until you get to the cross-cut going south, here at that point the lead is in evidence again. There is a little projection next to the face of the tunnel. On the north side opposite that south cross-cut, one could obtain a sample at least $2\frac{1}{2}$ feet wide. * *

After leaving this tunnel, I went to the Rabbit discovery shaft. This is a shaft 11 feet deep and at the bottom of that a drift runs in about three feet from the west. I found evidence of the existence of a lead in that shaft. I took a sample of what ore was shown there. The strike was from three to six inches wide. It went 7 1-10 per cent. * * *

The drift runs to the west showing a streak of ore 36 inches wide, all good ore that will go as high as seven per cent. cop-

per. It is the same vein." (Tr. pp. 210-211.) He also testified that he went into shaft No. 1, as shown on Defendants' Exhibit 1, in which he found a sort of disintegrated altered granite, and a quartz-bearing seam, which suggested a lead to him as a geologist. He found similar conditions in shaft No. 2. He also entered shaft No. 9, the timbered shaft, and the lead is exposed in a cross-cut to the north from that shaft (Tr. pp. 211-212). He visited the Hornet shaft and found ore that would go as high as $9\frac{1}{2}$ per cent. copper, and took samples which were received in evidence (see Defendants' Exhibits 42 to 52). In the judgment of the witness the lead disclosed in the Hornet discovery is the same lead that he encountered in the cross-cut in the tunnel. (Tr. p. 221.)

EVAN P. CLARK testified as follows: That he is a practical miner, and that he has known the ground in controversy since 1901. That he never knew of any placer being carried on there (Tr. p. 295). That he examined shaft No. 1, and found a lead there with an easterly and westerly strike. He also visited the Rabbit discovery shaft and found a lead there with an easterly and westerly strike. He also saw a lead in the cross-cut from No. 9 shaft containing copper ore (Tr. p. 296). In the openings he examined he stated there is all the evidence necessary for a practical miner or prospector to make a legitimate location for quartz, in either one of the exposures. He went into

tunnel 31, and found plenty of commercial ore there, in both large and small bodies. As conditions exist there now (referring to tunnel 31), including everything between those two different streaks, there would be eleven or twelve feet of ore. * * * "That entire body, for its entire width, is of such a character that I would ship it all. The course of that vein is easterly and westerly; as to its dip, it stands fairly straight, leaning, I should judge, a little to the north. We come to that ore again about 35 feet in, where the course of the tunnel cuts the ore streak on its course. There is about 10 feet of ore there, that is a rough estimate. * * * The ore body that we encountered in the tunnel is one and the same ore body that we encountered in the cross-cut. Beyond that and approaching the face of the tunnel, there is ore all the way." (Tr. pp. 297-8.) He also visited the Hornet discovery shaft, and found evidence of a lead containing copper (Tr. p. 299), and the indications were such that he as a reasonable mining man would be justified in locating it and expending money in its development (Tr. p. 300).

WILLIAM MAYGER testified that he had been living in Montana since 1864, and had been engaged in mining all the time, and is at present manager of the St. Louis Mining and Milling Company at Marysville (Tr. p. 349). He visited shaft No. 1, and found

it cut by a number of stratas of quartz, going down almost vertically. The appearance was such that a reasonable mining man, in the exercise of ordinary judgment, would be justified in locating the ground (Tr. p. 350). He found the same indications in shaft No. 2, and the strike of the lead was apparently the same, easterly and westerly. He found the disclosure there of such a character that he as a reasonable mining man would be justified in locating the ground and prospecting it. He went into tunnel 31, and found strong evidence of a fissure passing through the back of the tunnel. About ten or twelve feet from the end of the cross-cut running to the north, he found a strong vein of copper stained ore, commercial ore. (Tr. p. 353.) He also visited the Vesuvius discovery, which disclosed quartz, carrying copper, a sample being marked Defendants' Exhibit 60. It is his judgment that the lead found in shafts 1 and 2 and in the tunnel are one and the same vein (Tr. p. 357).

H. A. BOWMAN stated that he had lived in Montana off and on since 1885, and qualified as a practical miner and mill-man (Tr. p. 433-434). He made an examination of the ground in controversy and found two leads traversing the ground (Tr. p. 434). He examined shaft 21, and found the whole bottom of the shaft covered with ledge matter (Tr. pp. 434-5). He also found good indications of a lead in the face of the south cross-cut from tunnel 30. He did not go into

shafts 1 and 2 (Tr. p. 435). He found a vein in the face of the north cross-cut from tunnel 31, and in his opinion the wall of the vein is exposed. When he first visited this cross-cut, the face of the cross-cut was all in ore; there was at least a foot of it. Since his first visit the cross-cut was extended, and the cross-cut is now well mineralized for a distance of nine feet from the point where the ore was first encountered. There is now a lessening of mineralization as you proceed toward the face of the cross-cut; the face of the cross-cut is now in granite (Tr. p. 436). The lead appeared to be running in an easterly and westerly direction. Some of the ore was commercial ore. Defendants' Exhibit 66 is a fair sample. (Tr. p. 441.) The south cross-cut from this tunnel showed barren country rock. He encountered the lead which he saw in the north cross-cut again on the north side of the tunnel, 33 feet east of the north cross-cut. There was about a foot of it exposed there for a distance of 20 feet (Tr. p. 437). The vein was again visible at the face of the tunnel. (Tr. p. 438.) He saw a stringer of ore in the Rabbit discovery from 4 to 6 inches wide; it had an easterly and westerly course. He also found a good showing of a lead in shaft No. 9 (Tr. p. 438). He would like to find as good government land he could locate himself for quartz (Tr. p. 439). In his opinion the material he encountered in all these openings from the Vesuvius discovery to tunnel 31 would be one and the same vein. (Tr. p. 440.)

lead in the tunnel itself. He found a streak of ore in the north cross-cut from this tunnel a foot wide. It was very good copper ore and would pay to ship. The width of the lead there was sixteen or seventeen feet (Tr. pp. 507-8). The lead also was disclosed in the drift, about thirty feet from the cross-cut. (Tr. p. 508.)

He visited the Rabbit discovery, and found especially one streak of good copper ore. In his judgment all of these different openings disclosed the same lead.

He examined the Hornet shaft on the southerly lead, and found a lead disclosed in the shaft from a little above the tunnel or cross-cut clear to the bottom of the shaft. He obtained samples for the purpose of having them assayed (Tr. p. 510), and Defendants' Exhibit 71 is the return he received (see p. 1759). See also Defendants' Exhibit 72 (Tr. pp. 532-3, and Tr. p. 1760).

There was also a very good lead disclosed in shaft No. 19 (Tr. p. 511).

The evidence of a lead disclosed in all of these workings was such that he as a reasonable mining man would be justified in locating the ground and spending his money in its development (Tr. p. 512).

LLOYD G. GAGE, a civil and mining engineer, testified as follows, referring to shaft 21, on Defendants' Exhibit 1: "I found rock in place in the bottom. The material in the bottom of that shaft is

either a vein or a dyke. There is no difference between a vein and a dyke, in the legal sense, so far as I know. In a geological sense I know there is a difference, but I am not a geologist. The dyke is brought there by a molten condition, and the vein is either from altered rock or it is altered rock, some way or other brought there in solution or decomposition. The reason I say there is no difference in a legal sense is that there are veins that carry values and there are veins that carry no values. The same is true of dykes. And to make a valid location you must have rock in place, containing ore, or containing a valuable metal, so you can locate a dyke or a vein as a quartz lode claim. I am not enough of a geologist to tell whether that is a vein or a dyke there, although there is rock in place. I say there is rock in place there carrying minerals to distinguish it from the wash. I know it carries minerals because I had a piece assayed. I could not tell from an eye inspection of it whether it carried minerals. I got the sample that I took to the assayer on the west side of the shaft, near the bottom. I took two separate samples, one maybe two feet from the north edge of the shaft, and one maybe two feet from the south edge of the shaft, *and in taking these samples I took the most unlikely rock I could find, because I wanted to see if the poorest of it contained any copper.* After taking these samples I took them to an assayer, Mr. Febles; he is the assayer for the Anaconda Mining Company. I got a return from him as to what these

On the southerly lead, he went into shaft 19. He found a well mineralized lead there, wider than the shaft. Tunnel 36 showed numerous stringers of quartz, which looked favorable as the capping of a vein (Tr. p. 441). Tunnel 37 also disclosed mineralized rock with good indications of a lead, and in his judgment it is a portion of the lead. (Tr. p. 442.) "I made an examination of the Mullins tunnel and the cross-cut from the tunnel to the Hornet discovery. I have been in there nearly every day, and have been out there 8 or 9 times. There is a lead disclosed there. I find it in all that work in the Mullins tunnel, that cross-cut south, and in the Hornet shaft; that is all one lead." (Tr. p. 442.) In his opinion all these openings on the southerly lead constitute the same vein (Tr. p. 445). He obtained Defendants' Exhibits 67, 68 and 69 from the workings of the Mullins tunnel as proof of his theory that it is all the same vein.

PAT MULLINS, a witness for the plaintiff, testified that he was familiar with the Pleasant View location (Tr. p. 464). He made an examination of all of the discoveries upon the ground and there was no vein disclosed in any of them. And yet, although he made the examination of these workings for the very purpose of purchasing an interest, he paid several hundred dollars for an interest in the ground, and knowing at the time that it was involved in litigation (Tr. pp. 469 to 470).

JOHN STAFFORD testified that he had followed mining for about forty years, and about twenty-four years in Butte. He first became acquainted with the property in controversy in 1903; he made an examination of the openings there at that time. He sampled the so-called hanging wall of the Mullins vein, and found it contained good values in copper (see Defendants' Exhibit 70), (Tr. p. 504).

At that time in 1903 he went into the Hornet discovery. He saw some very good ore there at that time, on the north side of the shaft. (Tr. p. 505.)

Upon a recent examination he went into the deep shaft No. 21 on the northerly lead. He found very good lead material, ledge matter and vein matter in there, in the bottom of the shaft, and also for a distance of about five feet up the shaft. He also found the same lead in the tunnel to the east (Tr. pp. 505-6). He went down shaft No. 1 and found good evidence of mineralization there. "There is a streak of quartz running east and west about ten inches wide * * * then there is another streak more to the north, running east and west. * * * As a mining man, with my experience, I would say that is vein matter. There is enough disclosed there so that I could determine the strike and dip of that lead. The strike is east and west, and the dip is a little to the north." (Tr. p. 506.) He found the same evidence of mineralization in shaft No. 2; the same lead material (Tr. p. 507). He then visited the Rabbit tunnel—tunnel 31. He found a

samples contained." (Tr. p. 544.) He examined shafts 1 and 2 on the northerly lead. No. 1 contained granite, and No. 2 aplite. The granite was decomposed, with seams in it; it had an east and west strike. Some of the material in each of these shafts was vein matter. (Tr. p. 545.)

Testifying with reference to the cross-cut north from tunnel 31, he stated: "*For twenty feet in that north cross-cut I found no specks of coloring of copper at all, looked like absolutely barren granite, and then came into what they called chrysocolla.* The total length of that cross-cut is thirty-seven feet, and the ore goes to within a foot of the face; at least twenty feet there was no ore. There would be approximately fifteen feet of the vein exposed containing chrysocolla. I do not know whether all of that is commercial ore, but a whole lot of it is. The twenty feet I said I went through barren granite, I would call country rock. In this lead that is exposed in this cross-cut, I think I saw what might have been the hanging wall within a foot of the face; I saw the foot wall about twenty feet in from the tunnel. The strike of the lead was easterly and westerly. The dip was northerly." (Tr. pp. 545-546.) "Going easterly from the mouth of that cross-cut, when you come to the bend of the tunnel, you run into the lead again, and the tunnel follows the lead from that point, I think, into the face." (Tr. pp. 546-547.)

"I went into the Rabbit discovery shaft. It may be

twelve feet deep, untimbered, and now there is a little drift at the bottom of it running westerly. It is run approximately three feet from the bottom of the shaft. I found evidence of a lead there; I found this chrysocolla with an easterly and westerly strike. There was no large body of it; it was rock in place." (Tr. p. 547.)

"I went into shaft No. 9. No. 9 shaft is in vein material. There is a cross-cut north, half way down the shaft, and that discloses vein material likewise." (Tr. p. 548.)

"I also went into the Vesuvius. * * * Both the cross-cut north and the cross-cut south from the Vesuvius shaft show stringers of chrysocolla and have a northerly dip and an east and west strike. Those stringers are an inch or two wide; there are a great many of those stringers in the cross-cut; they are probably all one vein." (Tr. p. 548.)

In the judgment of the witness, a reasonable mining man would be justified in locating the ground with shaft No. 1 as a discovery, with the expectation of finding a mine and developing the property; he would likewise be justified in locating shaft No. 2 in the same manner. A reasonable mining man would also be justified in locating the ground with the mineral showing in shaft No. 9. (Tr. p. 549.) And in the judgment of the witness, the openings on the northerly lead are on the same lead (Tr. p. 549).

The witness found rock in place in shaft 19 containing copper. The openings in tunnel 36 showed de-

composed granite, and stringers of what have been termed aplite or quartz; there were little stringers of aplite or quartz all through this ground. The existence of the quartz there would indicate a vein. (Tr. p. 550.)

"I went into tunnel 34. The tunnel is in wash for approximately 35 feet and from that point or a little farther in, it follows a lead clear to the face." (Tr. p. 551.)

CLINTON C. CLARK, one of the defendants, testified as follows: That he made an examination of the ground in 1901, and at that time the Hornet tunnel was run in to its present distance. At that time you could see the ore in three sides of the shaft. He examined it at that time (Tr. p. 584). The Gulf discovery was there also at that time (Tr. p. 584). On the northerly lead, the timbered shaft was there, the Rabbit discovery, and several other holes at that time. (Tr. p. 585.)

The witness worked the Pacific claim adjoining the ground in controversy, to a depth of at least three hundred feet, and found no such character of mineralization as in the ground in controversy. The "hundreds of acres" to which Mr. Winchell testified, did not extend that far.

The witness has known the ground in the immediate neighborhood since 1881, and no placer mining was ever done on the ground in controversy. The witness carried water out there from town and had half a dozen

experts pan the ground thoroughly in several places, and could not find a color of placer gold. (Tr. p. 589.)

At the time he worked the Pacific he made shipments of ore which went 15.5 per cent copper. He operated the Pacific in 1901 and 1902 (Tr. p. 590).

The witness examined all of the openings on both leads, and the indications were such that as a practical miner he would locate the ground and spend his money in its development.

JOHN HOYLAND, a witness in a former action involving the same ground, testified that he knew what is called the Hornet shaft. He was living out there in 1891, about half a mile distant. He saw sacks of ore at the collar of the Hornet discovery shaft in May 1891; that was about the 6th or 7th of May (Tr. p. 659).

ELI REA testified that he was familiar with what is known as the Point Pleasant and Pleasant View quartz claims in 1891; that he was employed by Mr. Mason during the latter part of April and the first of May of that year in sinking shafts on these two claims. He commenced work about April 20 and worked until about May 19th of that year. On one of the claims they dug two holes about twenty feet apart, and at a depth of about eighteen feet they struck a solid body of copper ore, covering a good part of the hole. He took samples at that time as keepsakes or souvenirs. (Tr. p. 662.)

SAMUEL BARKER, a mining engineer, testified as follows: That he has known the Butte and Boston Placer ground since 1888, and in the practice of his profession he has crossed it innumerable times since 1888. No placer mining operations were ever carried on within the boundaries of the Butte and Boston placer to his knowledge since 1888, and the nearest placer operations to the knowledge of the witness was at least a mile to the southwest. (Tr. p. 678-9.)

The witness testified that he is familiar with what is known as aplite, and in his examination of the ground in controversy he saw some aplite. "It does not constitute the general bulk of the country rock there. The gray granite is there in greater quantity than the aplite. At the surface it is wash out there, that has been carried down from the steep hillsides to the east. In the solid rock, it is every conceivable dip and direction. The bands, if you might so term them, of aplite, are generally small. They differ in color underground from the gray granite. The gray granite was there first and the aplite has been intruded into the granite." (Tr. p. 688.)

"In some portions of this district veins have walls or boundaries; in other portions not. Now, for instance, to the west are silver veins and the walls are in most cases well defined, but you take it in the copper district no well-defined walls are found in a great number of the mines that are being worked at depth. That is due to the mineralization of the granite by

replacement by copper solutions, or by solutions containing copper and other metals." (Tr. pp. 688-9.)

The witness testified that he had a very intimate acquaintance with all of the ground surrounding the ground in controversy, and having in mind the mineralization encountered in the cross-cut from the Mullins tunnel to the Hornet discovery, he stated there is not hundreds of acres of ground in that vicinity mineralized in that way. (Tr. p. 696.)

His definition of a vein is: "A vein is mineralized rock in place such as would justify one in spending time and money in prospecting the same." (Tr. p. 696.)

"In my examination of the ground here I have found evidence of leads traversing this ground. I found at least two veins. The north vein traverses the northern portion of this Butte and Boston placer, and its strike is very nearly east and west, a little bit I should say north of west. It has a peculiar characteristic in that it dips to the north. Most of the veins in the Butte camp dip to the south. The south vein I find in the Hornet tunnel and the various workings therefrom, or tunnel 34, shown on Exhibit 1; that has a northwesterly strike and dips to the south." (Tr. pp. 696-7.)

"Taking up this northerly lead and referring to shaft 21, I find there iron oxides, altered granite,—that is, altered country rock,—clay, some minute particles of quartz, and I also found direction for some small seams which I think are iron oxides, the direc-

tion being easterly and westerly and with a northerly dip. I SAY THERE IS A VEIN THERE. THERE IS ABSOLUTELY NO QUESTION OR DOUBT IN MY MIND ABOUT IT." (Tr. p. 697.) He also found evidence of a lead in the south cross-cut from tunnel 30 (Tr. p. 697). "I find a vein in shaft No. 1. It is a very small vein dipping to the north, and has a northwest strike. I obtained a sample of the material I found in shaft No. 1." (Sample marked Defendants' Exhibit 77), (Tr. p. 699.) "There is sufficient of the lead in shaft No. 1 to determine its strike. There is at least three feet in length of this vein shown on this strike. You find the granite on either side of the vein, but they are not smooth, slick walls. The mineralization there is irregular, but it has a dip and strike." (Tr. p. 699.) The vein evidences are such that it would justify a reasonable mining man in locating the ground and developing it. "There was sufficient exposure of the lead in shaft No. 1 so that I could tell the dip. I saw it for a vertical depth of 6 or 7 feet at least. I remember I had to climb up the shaft to see the end of it. The dip was about 85 degrees to the north." (Tr. p. 700.) "I found excellent veins in the north cross-cut from tunnel 31. * * At 23 feet from the center of the tunnel, I found a small streak, one or two inches wide, dipping to the north. * * * At 26 feet I find the footwall of the vein. I find 15 inches of excellent vein material, better in fact than ninety-nine in a hundred of the claims

I have seen or examined or located. At thirty-three feet, I find another seeming wall, but I think it is a portion of the same vein. * * * I should call it quite a wide vein. I think the two rich streaks there are merely in the same lode. I did not take a sample and have it assayed, but from my knowledge I would say it is commercial ore." (Tr. p. 702.) "From the examination of the mineralization disclosed in that cross-cut, and I looked at it very carefully indeed, the mineralization does not disappear rapidly from the top of the cross-cut to the bottom. I heard the statement made by Mr. Winchell with reference to that. I thereafter made an examination, making that one of the particular things to look at, and instead of that, I find the vein mineralization as great at the bottom as it is at the top." (Tr. p. 703.) "I was able to determine the strike of that lead as disclosed in the cross-cut. I took the strike of the footwall and I took the strike of the mineralization. * * * The footwall I found to have a strike of south eighty degrees west, dipping eighty-five degrees to the north." (Tr. p. 703.) "Both the hanging and foot walls are granite on each side of this vein. The vein itself is so terribly green that any one could see where either wall would be." (Tr. p. 704.) "Leaving this cross-cut and going farther into the tunnel, you encounter this lead again where the tunnel takes its northeasterly direction, and where it has a north 67 degree east strike. That is about 37 feet from the north cross-cut. I find the fault in the

back or roof of the drift, and down for some little distance, but the vein is dislocated near the bottom, where you can see this fault material coming in contact with it. You can trace the vein east from that point a distance of 15 or 20 feet, maybe 25 feet; then it is intercepted by a fault which has a northwesterly and southeasterly strike, dipping to the east. The vein is found on the west side of that fault up to where it is intercepted by the fault plane on the east side of the fault." (Tr. p. 705.) "The true strike of that vein is north 85° west." (Tr. p. 706.)

Defendants' Exhibit 82 was obtained by the witness from the point in tunnel 31 where the vein is first exposed by the tunnel east of the cross-cut, showing it contains copper. The witness testified: "One of the real reasons why I brought that sample was to show what Mr. Winchell calls the interlocking of quartz crystals in veins. Mr. Winchell said that that vein was entirely aplite. I say that it is typical vein quartz, interlocking exactly as Mr. Winchell said it would in real veins." (Tr. p. 707.)

"The small cross-cut running to the south, near the face of tunnel 31, shows more or less of this same discoloration, and a small streak of very highly mineralized material, containing cuprite and chrysocolla. Its dip was to the north, and the strike easterly and westerly. There is no connection there now between this and the lead I observed in the first cross-cut to the south. It will require further work to prove the

continuity of these several streaks. I also made an examination of this cross-cut to the south, a little east of the cross-cut to the north. I heard Mr. Winchell say there was no aplite in that cross-cut to the south. My first notes made on the ground showed that there was aplite there, and I went back to look at it carefully, and there is a great deal of aplite there. He said he counted as many as fifty, and then stopped, of little harder streaks in the granite, but he said there was no aplite there, and thought that was 20 to 25 feet below the wash. The wash is shown in the top of that drift, and there is a great deal of aplite there. That is the reason I made another examination of it. The aplite appears there intrusively. You find the granite on top of the aplite. The aplite is an intrusive sheet there. It is nearly horizontal." (Tr. p. 709.) "I went into the Rabbit discovery. I found a vein there. It was dipping to the north, and the strike was a little to the northwest (Tr. p. 710). * * * I traced that lead by the work I did there across the bottom of the shaft. *In the sinking of that shaft there, the lead would be exposed.*" (Tr. p. 710.) "I also went into shaft No. 9. In the cross-cut north from this shaft, at the 25 foot point, there is a vein exposed." (Tr. p. 711.) Defendants' Exhibit 85 was taken from this vein. The witness was of the opinion that the leads disclosed in the several openings are one and the same lead (Tr. p. 713).

"With regard to the southerly lead, and the evidence

of mineralization in the Hornet discovery shaft,—immediately before bedrock was encountered, I find on the north side of that shaft, a small streak of high mineralization, containing cuprite and chrysocolla. That streak has an easterly and westerly strike and a dip very flat to the north. *That streak will, on its dip, go into and become a part of what is called the Mullins vein.* Farther down in the shaft, I find at least two other of those same highly mineralized streaks having an easterly and westerly strike and the same northerly dip. At the bottom of the shaft I find the brown material, which is good vein material, dipping to the north * * * with a flat dip to the north * * * and having an easterly and westerly strike. The shaft itself, where exposed now, is quite green,—that is, there has been mineralization or replacement in the granite. I say that these rich streaks, having a trend to the north (Tr. p. 717), become a part of the Mullins vein, because it is almost continuous, excepting for the slight break between the Hornet tunnel cross-cut and the cross-cut at the bottom from the Hornet discovery,—shows that it has an east and west strike and flat dip, and does go over and join onto the vein that has been talked about here and called the Mullins vein. I first encountered this mineralized streak in the shaft within six inches of the point where the wash and the solid country rock is encountered. As to the mineralization on the north side of the shaft being continuous, the same kind of material exists from

the point where bedrock is reached to the bottom of the shaft, except for these richer streaks. I should say that the material was well impregnated, well replaced with copper, because I took a sample beginning at the bottom of the Hornet discovery shaft along both the east and west sides of the cross-cut northeasterly therefrom, and I got a very fair assay from that material.

* * * I might say, in taking this sample, I was very careful indeed to exclude every piece of this highly mineralized chrysocolla and cuprite that you find encountered in this north cross-cut. In fact, I took the worst material I could find. This sample was taken from at least 18 feet north and south,—that is, from the north side of the Hornet discovery shaft, up to within a foot of the vein that is shown at the north end of that cross-cut. (Tr. p. 718.) “The returns given me by Mr. Hocking (the assayer) are three-tenths of an ounce in silver and seventy-one hundredths per cent. in copper. I also took a sample of the brownish streak that I found in the bottom of the Hornet discovery shaft and west therefrom, and took it to Mr. Hocking and had it assayed. I obtained that sample by thoroughly cleaning off the material there, and picking off the surface, and then taking a sample underneath that, so that I would have the material only from this streak, and it was taken for a distance of four or five feet in an easterly and westerly direction. None of this chrysocolla was visible where I got this sample No. 1.” (Sample marked Defendants’ Exhibit 80), (Tr. p. 719.)

Having in mind the mineral conditions in the Hornet discovery as they were disclosed in that shaft, if a man did not locate it, I should say that he was not in his right senses. That is one of the nicest showings I have seen. (Tr. p. 719.)

I would also say that a man would be justified in locating the Rabbit discovery upon the showing there (Tr. p. 720); and he would certainly be justified in locating the ground with the exposures as they exist in shaft No. 9 (Tr. p. 720).

Referring to the Mullins vein, the witness testified: "I do not think that the walls of the lead there bounding that lead are the true walls of that vein; or that the northerly and southerly boundaries of the Mullins shaft are not the footwall or the hanging wall of that lead. I say that because I can find better ore either on the foot or hanging side of that streak, and going down into the drift on this same streak below, I can find just as good ore outside of the well-defined wall as I find inside. The whole of the material between the Hornet discovery shaft and the tunnel to the north is mineralized and I should say it was a vein; it is the same vein; the mineralization came from the same source." (Tr. p. 723.) Defendants' Exhibit No. 93 was taken from the so-called footwall of the Mullins vein (Tr. p. 724).

CHAS. E. KINMAN testified that he has known the ground in controversy for thirty years, and during

that time no placer mining work has been done upon or adjacent to it (Tr. p. 851). He saw two veins traversing the ground, one known to him as the Hornet and the other as the Rabbit (Tr. pp. 854-855). He visited shaft 21 on the Rabbit lead. The bottom of it was all vein material. He visited tunnel 31, and in a cross-cut to the south he saw a vein exposed 15 feet in width (Tr. p. 856); he also found more of this brown quartz in shaft No. 2 (Tr. p. 857). In the north cross-cut from tunnel 31, he found two streaks of copper, one about a foot wide, and the other about two and a half feet wide. He saw a vein there and measured it; it is 37 feet wide. The foot wall of this vein was in the tunnel, and the hanging wall was in the breast of the north cross-cut. He went into the Rabbit discovery and found a lead there, containing a streak of green copper about six inches wide. Shaft No. 9 was all ledge matter. He found evidence of a vein in tunnel 35, and lots of vein material in tunnels 36 and 37 (Tr. pp. 860-1). He found that the Hornet discovery contains a vein with shipping ore (Tr. p. 862).

DANIEL J. WILLIAMS, the engineer for the East Butte Copper Company, which owns the ground directly to the west of the ground in controversy, testified that the veins in the East Butte ground do not come to the surface, and they are covered with a deep deposit of wash. That one of the principal veins in

their ground, the Donner vein, has been opened up for a distance of about three thousand feet, and has been exploited to within four hundred feet of the ground in controversy, and at that point the vein was still strong. All of the veins in the East Butte ground have an easterly and westerly strike. In the opinion of the witness the Donner lead is the same lead as exposed in the tunnel on the ground in controversy. (Tr. pp. 891-896.)

LOUIS MASON testified that he sunk shaft 21 in the Summer of 1911, and that he determined the point of location of the shaft by putting a stake between the Rabbit discovery and shaft No. 9, and set another stake over the north end of the north cross-cut leading north from the Rabbit tunnel,—tunnel 31, He sighted from the stake between shaft No. 9 and the Rabbit discovery and the stake at the end of the cross-cut, or tunnel 31, and sunk the shaft (Tr. p. 917). The entire bottom of the shaft, from the time he struck bed rock, was in vein matter (Tr. p. 918).

ANDREW G. RAY, the foreman of the East Butte Copper Company, testified that he was familiar with what is known as the Donner vein in their property; they have opened it up for a distance of about three thousand feet in an easterly and westerly course (Tr. pp. 938-9), and if it continues its course beyond the ground owned by their company it would go into the

ground in controversy (p. 941); and SAMUEL BARKER testifies to the same effect (Tr. p. 951 et seq.).

ELLIOTT H. WILSON, a witness for the plaintiffs, testified that he made the survey for patent for the Butte & Boston placer, and that prior thereto he accompanied Mr. Kemper to the ground and pointed out to him the boundaries of the patented ground adjoining (Tr. p. 1103). He testified: "My information was in December, 1890, to the effect that this ground was located but no discoveries had been made; I was so informed by Mr. Kemper, I think. Mr. Kemper undoubtedly knew at the time I was out there that the ground was covered by quartz locations; a few days afterwards I made my official survey of this ground in question, and to be sure that there could be no injustice done by going to placer too rapidly, I showed the openings, the alleged discoveries on this ground on the Pleasant View claim. * * * When I went there in December with Mr. Kemper, I presume he knew that the ground was located then; the ground was covered with stakes. * * * At the time I was out there I went to the Pleasant View discovery hole or within a very few feet of it, and Mr. Kemper was along, but I don't remember whether I saw quartz on the dump." (Tr. pp. 1146-7.)

It is Mr. Wilson's theory that "the mineralization of this territory, outside of the fissure veins, was not accomplished from faulting; it was accomplished from erosion of the country and by the carrying down in

solutions of a very little, slight saturated copper, or waters carrying copper, in connection with sulphuric acid, that was obtained, of course, from the deposition of the original chalcoprite which it contained in minute quantities along the granite of this neighborhood; carrying it down into little fault fissures * * * and into joint planes of the granite * * * and in channels for the descending waters to enter." (Tr. p. 1172.)

And Mr. JULIUS H. WARNER, a mining geologist, testifying with reference to the conditions appearing in tunnel 31, stated: "In the second cross-cut north, a distance of about 20 feet north of the tunnel, a well-defined fracture zone following an aplite dyke is evidenced, twelve to fifteen inches in width. Along this zone of fracture there has been a considerable deposition of chrysocolla. The immediate hanging wall is granite; the immediate footwall is aplite. As to this mineralization, there is evidence to me that it is anything further than the surface infiltration along this zone of chrysocolla and iron oxide." (Tr. pp. 1203-4.)

And the same witness testified: "These zones from a generic standpoint, I would not think are veins such as are followed successfully in the Butte camp. At the particular point noticed, in so far as they have indications of value, that might lead a miner to follow them with the expectation of finding ore—producing ore,—they might be considered veins. *I would say they would justify a miner in following them.* Right in

that cross-cut I think he might take out some ore, and similar conditions might exist at that elevation to some extent in both directions. I would not expect that condition to continue to any great depth," (Tr. p. 1215.) "There is no question, I think, in my mind but that there are two occurrences in shaft 31 or tunnel 31, that would warrant the miner in following them in the hope of finding ore. I call them veins in that sense; they do not show to me those typical characteristics which we usually find accompanying the real veins of this camp." (Tr. p. 1245.) "I would call those two separate veins from the standpoint of a miner. The dip of the most southernly one was 76° to the north, and the dip of the northernly one was 80° to the north." (Tr. p. 1246.)

And it would seem to be the opinion of this witness that in order to justify a miner in locating a vein it must carry commercial ore. (Tr. p. 1271.)

And WILLIAM B. FISHER, a witness for the plaintiff, admitted that there is a well defined vein in the north cross-cut from tunnel 31, and that the vein shown in the tunnel itself is the same vein (Tr. p. 1304). And the same thing is admitted by Mr. Warner, a geologist called on behalf of the plaintiff (Tr. p. 1248). And Frank A. Linforth, a geologist and mining engineer, called to testify for the plaintiff testified to the same effect (Tr. p. 1388). And see the testimony of Dennis Kennedy to the same effect (Tr. p. 1541).

SIMEON V. KEMPER, the vice-president of the plaintiff corporation, testified that he had known the ground in controversy since 1877 and 1878, and that he has known it intimately since 1890, at which time he was one of the locators of the Butte & Boston placer. He assisted the U. S. Deputy Mineral Surveyor in surveying the ground for patent (Tr. p. 1556). He visited the ground a number of times during the summer of 1891, and every time he went out there it was for the purpose of examining the ground and workings, and he remembers that there were several shafts sunk there; his inspection was sufficient to acquaint him with all the shafts on the ground in the summer of 1891 (Tr. p. 1557). He placed the location notice upon the ground himself on the 20th of December, 1890, (Tr. p. 1573), and located it as placer because he could not find a discovery upon which to base a quartz location (Tr. p. 1572). He also saw ore on the dump of the Hornet discovery shaft in 1891, and he saw some good float there on the surface of the ground (Tr. p. 1575). Notwithstanding the fact that there was, in his opinion, no lead or vein discovered upon this ground, he gave away one-third of the Butte & Boston Placer in settlement of the adverse suit commenced by the quartz claimants against the placer application "because it is always cheaper to compromise than it is to pay lawyers." (Tr. p. 1575.)

ARGUMENT.

The ground covered by the Butte and Boston placer embraces twenty-nine acres, as shown on the map. In April, 1890, Mr. Passmore and Mr. Hamilton first located this ground. The locations made by them were called the Point Pleasant and the Pleasant View Quartz Lode Claims. The discovery shaft of the Point Pleasant claim was at the eastern end of the claim and outside of the ground afterwards located as the Butte and Boston Placer. The discovery of the Pleasant View was within the boundaries of the placer location. It seems that in the case of the Pleasant View, in the discovery shaft, a boulder of quartz was encountered, and the locators, presumably, believed that they had reached bedrock, and utilized this exposure as a discovery. It is more than likely from the proof, that the quartz boulder encountered existed in the wash, and was not rock in place. In the case of the Point Pleasant, there can be no contention, as it seems to us, but that the discovery was sufficient to authorize the location of ground. The evidence as to the discovery stands uncontradicted, and the exposure, according to this evidence, was of such a character, with reference to mineralization, as to authorize the location of the ground under the mining laws of the United States.

The record discloses that the law was complied with, as to markings, boundaries and posting notices,

and the notices were recorded within the time prescribed by law.

On December 20, 1890, the ground practically covered by the quartz locations mentioned, was located as the Butte and Boston placer, and the application for the placer patent was made on the 11th of May, 1891.

Mr. Louis Mason, one of the defendants, in this case, became interested in the quartz locations above referred to, and, on the 16th of April, 1891, began to do some work on the ground. It is contended, on the part of the appellants, that before the 11th of May, 1891, Mr. Mason sank three shafts on the lead of the Point Pleasant claim, and that in each of these shafts, the lead was encountered. These shafts are referred to as Shafts 1, 2 and 3. Mr. Mason, likewise, before the date specified, sank a shaft on the lead of the Pleasant View. This shaft, in this controversy, is referred to and designated as the Hornet shaft.

Appellants contend that as to the Point Pelasant location, the ground covered by the location, when the placer location was made in December, 1890, was segregated from the public domain, and was not then subject to location, and that, as to that location, it is not a matter of twenty-five feet on each side of the lead. As to the Pleasant View location, however, by reason of the location of the ground as a placer in December, 1890, before the Hornet lead, so-called, was

discovered the next year, it is simply a case of a known lead within the boundaries of the placer. Of course, the proposition, as to the existence of a known lead is, likewise, involved in the consideration of the Pleasant View lode.

Section 2333 of the Revised Statutes of the United States provides as follows:

“Where the same person, association or corporation is in possession of a placer claim and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case, a patent shall issue for the placer claim, subject to the provisions of this Chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of such placer claim or any placer claim not embracing any lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings, and where a vein or lode, such as is designated in Section 2320 is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the

placer claim has no right of possession of the vein or lode claim, but where the existence of a vein or lode, in a placer claim is not known, a patent for the placer claim shall convey all valuable minerals and other deposits within the boundaries thereof."

The period when knowledge of the existence of the lead is fixed is at the time of application for the placer patent,—in the present case, the 11th of May, 1891.

The Supreme Court of the United States, in the case of

Reynolds v. Iron Silver Mining Co., 116 U. S. 697,

considering and construing this section, said:

"We are of opinion that Congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms."

In the same case and at a later date, 31 Lawyers' Edition, 464, the same tribunal said:

"When this case was formerly before us, it was held that if a lode or vein of gold, or silver, was known to exist within a placer claim at the time the application for a patent was made, the patentee could not recover its possession, even as against a mere intruder. The patentee having no title to such lode or vein by reason of its ex-

ception from his patent under the statute, could not enforce any legal right to it against anyone, being bound to rely upon the strength of his own title and not the weakness of his adversary's. The defendants, therefore, on this trial placed their defense upon this exception; and the question for determination was, whether the lode or vein in question was known to exist at the time the application for a patent was made."

In the case of

Iron Silver Mining Co. v. Mike & Starr G. & S. M. Co., 36 L. Ed. 293,

the Supreme Court of the United States said:

"In other words, the court ruled that if the vein was known to the placer patentee at or before entry and payment, although not known at the time of the application for patent, it was excepted from the property conveyed by the patent. Into this ruling the court was doubtless led by the language of the patent, which in terms exempts all veins or lodes known to exist at the date thereof; that is the date of the issue of the patent. In this respect, there was error. The time at which the vein or lode within the placer must be known in order to be excepted from the grant of the patent is, by section 2333, the time at which the application is made."

Our inquiry, then, is directed to the conditions existing as to known leads on and prior to the 11th day of May, 1891. It is true that as to the Pleasant View location, no discovery being made before the placer location, and such discovery being essential to render the quartz location valid, the placer location, as to that ground, would be effective; the known lead, of course, being excluded. The doctrine seems to be that where no intervening rights arise, and the discovery is not made at the time when the notice is recorded, but is made at a time subsequent thereto, the doctrine of relation back applies. This is the rule announced by the Supreme Court of the United States, whose declarations on these matters are controlling and final, in the case of

Creed & C. M. Co. v. Uintah T. M. & T. Co.,
49 L. Ed. 508.

See also

139 American State Reports (Note) pp. 162-163.

By reason of the application for the placer patent, adverse proceedings were instituted by the quartz claimants, and actions were instituted, pursuant to law. These actions were compromised, and, as the result of the compromise, a placer patent issued; the patentees conveying to the quartz claimants a portion of the ground patented as placer ground the same being the easterly portion of the ground. After this compro-

mise was effected, a portion of the ground was again located in 1895 by Lee Davenport as the Lynne quartz claim; the Hornet discovery shaft, so-called, being utilized as the discovery for the location, and some work was done upon the ground in the way of representation work by the new locator.

Mr. Mason was interested in the Lynne location. In 1900 Kift and Noyle again located the ground partly covered by the Pleasant View location, and as a discovery, cleaned out the old shaft and ran a cross-cut towards the north; the locators claiming that in this cross-cut, mineral was found authorizing a location. Before the Hornet location was completed, Mr. Mason obtained from the locators a lease and bond on the ground covered by the location. Some controversy arose as to the conveyance of the Hornet under the lease and bond, and, in consequence of this, an action was brought to compel a transfer of the property under the lease and bond, which resulted successfully; so that the Hornet location became the property of Mr. Mason and his associate, Mr. Merri-man, and to provide against an attack on the validity of the Hornet location, should one be made, Merriman, after acquiring the interest which he did, located the ground as the Gulf quartz lode claim and a portion of it as the Hope quartz lode claim, and, likewise, located the ground theretofore covered by the Point Pleasant location, calling the new locations the Rabbit and the Olivia. These claims, necessarily, overlapped,

as an inspection of the maps will disclose, but the locations were made by the same parties, and were made to cover any defects that previous locations might possess or disclose.

In connection with the several locations referred to, the necessary markings were made and the necessary notices of location recorded. After the lease and bond was given on the Hornet in 1900, work was carried on by Mason and Merriman on the ground covered by the location, and the Mullins tunnel, so-called, as it now exists, was run. To prevent the extraction of ore uncovered in this tunnel, a suit was instituted by the Butte Land and Investment Company, the grantee of the placer patentees, against Merriman and Mason and others. In the trial court, it was held that the compromise effected in 1895 and the judgments entered pursuant to the terms of the agreement estopped Merriman and his associates from claiming that there were known leads on the ground. The trial court held in favor of this contention. The Supreme Court, reversing the judgment of the lower court, declared differently.

Butte Land and Investment Co. v. Merriman,
32 Mont. 402.

That action is still pending undetermined. The Butte Land and Investment Company transferred its interest to the present complainant, a foreign corporation, and the present suit was instituted. Transfers

have been made of interests in the ground covered by the quartz locations, so that the present defendants claim the ground on account of the transfers so made.

Appellants contend in the first place, that by reason of the Point Pleasant location, made in 1890, antedating the placer location, the ground embraced in the Point Pleasant location was not open to entry. This being true, and the court finding that the location was valid, it is not a question of twenty-five feet on each side of the lead. In that event, the entire ground covered by the quartz location in question, would be excluded from the placer patent.

Assuming now that the quartz location was valid, let us inquire what rights the locators acquired, and in what situation the ground was as being subject to location at a subsequent date.

In the case of

Forbes v. Gracey, 94 U. S. 767,

the Supreme Court of the United States, speaking of mining claims said:

“A mining claim perfected under the law is property in the highest sense of that term which may be bought, sold and conveyed, and will pass by descent.”

And in the case of

Belk v. Meagher, 104 U. S. 229, 26 L. Ed. 736,

the same tribunal speaking of mining claims, adopted its language in the case just referred to, and said:

"Mining claims are not open to re-location until the rights of a farmer locator have come to an end. A re-locator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has, in law, abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence, a relocation on lands actually covered at the time by another valid and subsisting location is void, and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

Nash v. McNamara, 93 Pac. 405.

And in the case of

Wolf v. Manuel, 152 U. S. 505, 38 L. Ed. 532,

the same court, speaking on the subject, after referring to Section 2319 Revised Statutes of the United States, said:

"And by Section 2322, it is provided that when such qualified persons have made discovery of

mineral lands and complied with the law they shall have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession."

In the case of

Mantle v. Noyes, 127 U. S. 348, 32 L. Ed. 168:

"There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak Lode Mining Claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their

title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale. The location having become completed in April, 1878, antedates by some months the application of the defendant for a patent for his placer claim. That patent was subject to the conditions of Section 2333 of the Revised Statutes, which is as follows:

“Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is

described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.'

"This section was before us for consideration in *Reynolds v. Iron Silver Mining Company*, at October Term, 1885, 116 U. S. 687 and also at the present term, 124 U. S. 374. As stated by the court at both times, it makes provision for three classes of cases:

1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then on payment of the sum required for a vein claim and twenty-five feet on each side of it at \$5 an acre, and \$2.50 an acre for the placer claim, a patent will issue to him covering both claim and lode.

2. Where a vein or lode, such as is described in a previous section, is known to exist at the time within the boundaries of the placer claim, the

application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

The section can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in possession of the locators or their assigns; for, as already said, such locations when perfected under the law are the property of the locators, or parties to whom the locators have conveyed their interest. As said in *Belk v. Meagher*, 104 U. S. 279, 283; 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent.' It is not, therefore, subject to the disposal of the government. The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that

he had no right to them.' Sullivan v. Iron Silver Min. Co., 109 U. S. 550, 554."

This court in the case of

Migeon c. Montana Central R. Co., 77 Fed. 249,

said:

"Before proceeding to discuss the controlling question, it is proper to state that appellants are not claiming any title under the Morning Star Lode location. Their application for a patent was made for the Childe Harold Lode Claim, which was located after the issuance of the patent for the placer claims. Appellants, however, argue that the placer patent as to the west 730 feet of the Morning Star claim is void, for the reason that at the time of the application for the placer patent the west 730 feet of the Morning Star was property which was withdrawn from sale by the United States; that any patent purporting to convey any portion of the ground was an absolute nullity; that the Noyes placer application did not include the Morning Star Lode; that neither said application nor the patent could include the said 730 feet of the Morning Star lode; that the title thereto remained in the government, in trust for the claimants under the existing location of the lode claim and their assigns, to be perfected upon the performance by them of the acts

required by law. This argument is based upon the assumption that by a mere location of a quartz lode the ground is withdrawn from sale, independent of the question whether a lode is discovered or known to exist. If the Morning Star was a valid and subsisting location at the time of the issuance of the patent to the Noyes placer claims, an important and interesting question would be presented as to whether, in a case like the present, the patent could be collaterally assailed. The law is well settled that a mining claim that has in all respects been fully perfected under the requirements of law is property in the fullest sense of that term, and therefore, during the time of its valid existence as such, would not be subject to the disposal of the government to other parties. *Belk v. Meagher*, 104 U. S. 279, 283; *Noyes v. Mantle*, 127 U. S. 348, 353, 8 Sup. Ct. 1132, 1134. But the fact is, as appears from the testimony in the record, that the Morning Star lode claim had been abandoned prior to the time of the issuance of the patent to the Noyes placer claims. This being true, it follows that the land embraced in the placer patent was, at the time of the issuance of the patent, a part of the public domain, which the government had the power to sell and dispose of."

Having in mind the force of the declarations in

the decisions referred to, and applying them to the facts before us, should it be found that the Point Pleasant location was valid, at the time of the application for the placer patent, there was a segregation of the ground from the public domain. It was not subject to location. The Government had parted with the possessory title, and held the legal title in trust for the quartz claimants.

This necessarily brings up for consideration the essentials of a discovery in the case of a location of the public lands of the United States for the minerals therein contained. Section 2319 of the Revised Statutes of the United States throws open to exploration and purchase the valuable mineral deposits in lands belonging to the United States; and in the Eureka case,

4 Sawy. 302, Fed. Cas. 4548,

Justice Field adopted the language of Judge Hallett defining a lead. His definition of a lead is as follows:

“To determine whether a lode or vein exists it is necessary to define those terms, and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well estab-

lished, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption may be regarded as a lode, whatever boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein. * * * Reverting to that definition, if there is a continuous body of mineral or mineral-bearing rock extending from one claim to the other, it must be that there are boundaries to such body and the lode exists; or if there is a continuous cavity or opening between dissimilar rocks, in which ore in some quantity and value is found the lode exists. These propositions are correlative and not very different in meaning, except that the first gives prominence to the mineral body and the second to the boundaries. Proof of either proposition goes far to establish a lode, and it may be said that without proof of one of them a lode cannot exist. * * * Excluding the wash, slide, or debris on the surface of the mountain, all things in the mass of the mountain are

in place. A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein."

See also:

Iron Silver Mining Co. v. Cheesman, 116 U. S. 535.

And as to rock in place, Justice Miller, in the case of Stevens v. Williams, 1 McCrary, 480 Fed. Cas. 13, 413,

said:

"I want to say that by rock in place I do not mean merely hard rock, merely quartz rock, but combination of rock, broken up, mixed up with minerals and other things, is rock within the meaning of the statute;"

And in

Tabor v. Dexter, Fed. Cas. 13,723,
Judge Hallet said:

"Whether the ore is loose and friable, or very hard, if the inclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering

than the superficial deposit, which is called alluvium, diluvium, drift, or debris, it is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location. In this bill it is alleged that the overlaying material is boulders and gravel, which cannot be in place as required by the act. * * * For the decision of this motion it is enough to say that where the mass overlaying the ore is a mere drift, or loose deposit, the ore is not in place within the meaning of the act. Upon principles recently explained, a location on such a deposit of ore may be sufficient to hold all that lies within the lines; but it cannot give a right to ore in other territory, although the ore body may extend beyond the lines."

And in the case of

Burke v. McDonald, 33 Pac. 449,

the Supreme Court of Idaho said:

"It must be remembered that every seam or crevice in the rock, even though filled with clay, earth, or rock, does not constitute a vein, nor every ridge of stained rock its cropping; nor, on the contrary, is it required that well-defined walls shall be developed or paying ore found within them. But something must be found in place, as rock, clay, or earth, so colored, stained, changed, and decomposed by the mineral elements as to

mark and distinguish it from the inclosing country."

If the Point Pleasant location was a valid location on the 11th of May, 1891, when the application for the placer patent was filed, then, as we have already stated, the ground covered by the location was not then subject to location. As to that location, it cannot be successfully contended, in the light of the proof, that a valid discovery was not made. It cannot be successfully maintained, as suggested in the decision of the learned trial court, that there was an abandonment of these locations. We are not contending that as to the Pleasant View location, it had validity against the placer location made before a discovery was made by the locators of the Pleasant View. We do insist, however, that Mr. Mason, from the commencement, insisted that these quartz locations were valid, and in all of the subsequent locations of the ground, we find him in the ownership of portions of it. We find him in the adverse suits, and after a compromise was effected, so that a placer patent issued, we find him interested in the Lynne location, and in 1900, when the Hornet location was made, he immediately acquired a lease and bond on the property, and afterwards secured a conveyance of same, and when the Gulf and Hope and Olivia and Rabbit locations were made in 1900, he acquired an interest in them. So that the ground in controversy from its first location in

1890 down to the present time has been, from the standpoint of the appellants, in their occupancy, and during all of this time work was done to maintain the integrity of the quartz locations.

We contend, then, that if the ground covered by the Point Pleasant location was located in 1890 before the ground was located as placer, it is not a case of getting the lead that traverses that ground, with twenty-five feet on each side of same, but it is a case of excluding from the placer patent all of the ground covered by the Point Pleasant location.

In this connection, and in this place, we might also discuss the legal aspects of leads not covered by locations but known to exist when the placer application was made, and especially for the purpose of determining whether the land should possess characteristics different from those in case the ground was about to be located under the mining laws of the United States.

We have already seen by the decision of the Supreme Court of the United States, in the case of *Mantle v. Noyes*, *supra*, that if the ground was located when the application for patent was made, Section 2333 would have no application. Assuming now, however, that no location was made at all, and the contention is indulged in that known leads were upon the ground, what are we required to show as to their character and mineralization? The record in this case so voluminous is largely so because of the theories advanced by geologists, some of them of national reputation,

as to what constitutes veins and vein matter. We have definitions of veins from these eminent gentlemen, and while no particular objection can be interposed to their definitions, their requirements of veins when applied to the facts largely transcend what their definitions suggest.

In the case of

Noyes v. Clifford, 37 Mont. 138,

the Supreme Court of Montana holds that known leads excepted from placer patents differ in no respect from leads on which locations may be made. The instructions which were given in that case, and the instructions which were refused, presented for determination the question as to what constitutes a known lead. The instructions which met the approval of the court were as follows:

"No. 7.—

"The Court instructs the jury that a vein, as the same is understood and defined by law, is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. In this definition the elements are a body of mineral or mineral-bearing rock and the boundaries. With either of these well established, very slight evidence can be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and

without interruption, may be regarded as a lead, whatever the boundaries may be. In the existence of such a body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lead. Such boundaries constitute a fissure, and, if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a vein or lode. The jury is instructed however, that not every vein or lode within the exterior limits of a placer claim is excepted from a placer patent unless the application is made for such vein or lode when the patent for the placer is applied for; but only such a vein or lode as comes within the definition of a known vein or lode as the same is defined in these instructions.

“No. 8.—

“A known vein, within the meaning of the term as used in these instructions, is a vein known to exist at the time of the application which has been clearly ascertained, and is of such an extent and value as to render the land more valuable on that account and to justify its exploitation and extraction of the mineral therefrom. This does not necessarily mean that the vein must show mineral values to such extent as would make the working of the same a profitable pursuit at the place where it is exposed; nor is it necessary that

the values contained shall be such as to demonstrate or prove that there exists a shoot or body of ore within the vein which it will pay to develop and extract. The phrase 'of such value as to justify the exploitation of the vein and extraction of the mineral therefrom,' is intended to mean, and does mean, that the vein is of such a character as would justify an ordinary person who was seeking in good faith to develop a mine in developing and working upon the same vein. In considering, however, the question as to whether or not any vein is a known vein, within the meaning of the term, it is proper, and you should take into consideration the amount of ore, the facility of working and reaching it, as well as the produce per ton which might or could be obtained therefrom, at the time of the application for patent."

Justice Field, in the case of

Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mng. Co., 143 U. S. 496, 36 L. Ed. 211, said:

"As stated above, there can be no location of a lead or vein until the discovery of precious metals in it has been had. And then it is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent of the ground embracing it, but those only which

possess these metals in such quantity as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and leads yielding no remunerative return for labor expended upon them. Such exceptions would only be productive of embarrassment to the patentee without any benefit to others."

This subject is very ably discussed in Costigan on Mining Law, under the heading "Lodes within Placers," where may be found all of the recent cases which give the subject consideration.

Costigan on Mining Law, 260 et seq.

It is a conceded fact, or, necessarily, must be so in this controversy, that there are some leads existing, and, it is, likewise, a conceded fact, or, necessarily, must be so, that one of these leads is in the ground originally located as the Point Pleasant. It is claimed, however, that these leads have been encountered by operations carried on subsequent to the date of the application for a patent, and that neither in the excavations made in connection with the original quartz locations, nor in the openings made by Mr. Mason, were leads disclosed, and that, consequently, their existence was unknown when the application for placer patent was made, and when the ground was located as placer ground. It is

an admitted fact that openings were made, but it is contended that they were surface openings, and that bedrock was not reached. While it is true that the evidence on these matters is conflicting, it seems to us that with the exhibits produced, and when we consider the requirements of the appellee as to what should constitute a lead to authorize the location of the ground as mineral ground, or to authorize the exclusion of a lead from a placer patent as a known lead, this conflict is more apparent than real.

The appellee contends that, in order to make a lead a known lead, its requirements must be entirely different from those where a location is made. Indeed, it is seriously contended that in the case of a known lead, its existence throughout the entire ground in controversy must be clearly established through a disclosure of the same. Such a requirement is unreasonable and unjustifiable. In this case, if these requirements have to be complied with, it will be necessary to make an excavation of probably hundreds of feet in depth before bed-rock is reached. Surely, the law does not require this, in order to demonstrate that the lead is a known lead. The time that would be consumed to accomplish this, with proceedings pending to have the ground patented as placer ground would render the task impossible of performance. The expert evidence, and, indeed, nearly all of the evidence adduced in behalf of the appellee, is of that character, and presents for consideration the theories of geologists

apparently at variance with the experience of practical miners. These theorists are forced to admit that a mineralization exists which makes the ground valuable for mining purposes. They tell us, however, that this mineralization occurred by reason of the erosion of the superincombent granite, which contained copper, and through descending agencies the material in the crevices or fissures became impregnated with copper. Of course, it matters little whether the mineralization resulted from descending or ascending agencies if it exists, and exists in such quantity as to give peculiar value to the ground, as possessing mineral. The ground, under those circumstances, is subject to disposal under the mineral laws of the United States.

We insist most respectfully that on the entire evidence with the physical facts corroborative of same, the proposition is not a debatable one that the leads on this ground were known to exist on the 11th of May, 1891, when the application for a placer patent was made. The ore on the dump where the Hornet shaft, so-called, was sunk, was so rich in copper contents as to excite general comment, and the ground itself had such physical characteristics as to surface, that any excavation made therein could readily be discerned.

Indeed, the appellee does not say that the leads do not now exist. The evidence offered by it affirmatively shows that they do exist. As the case now stands, it is an admitted fact that there is a north lead

and a south lead. It is said, however, that these leads were not encountered when the application for a placer patent was made. It is said that the south lead is disclosed in the Mullins tunnel, so-called, and the north lead is disclosed in the cross-cut of tunnel 31, and in the tunnel in its course to the east beyond the cross-cut, until cut off by a fault fissure.

Appellee's geologists, however, say as to this, that this mineralization is due to fault fissures; is due to the chrysocolla and cuprite found in the rock there, and is not the result of vein formation or vein mineralization, but, as already stated, is due to the result of the erosion of the granite. We are told by them, that through the process of erosion, six or seven hundred feet of granite have been removed, and that the small quantities of copper in this granite taken up by water have been disseminated in such a way that this mineralization, confessedly existing, has occurred in this ground. They tell us, as we have already stated that the mineralization existing is due to descending waters impregnated with copper rather than to ascending vapors impregnated with the same mineral. In other words, we have fine-spun theories in the effort to explain away facts which, without these theories, would justify the contention that the mineralization is of such a character as to constitute veins or lodes. In this way did the property in question present itself, as shown by the proof in this record, with evidence of mineralization existing, when Mr. Kemper pre-

sented his application for a placer patent. While it is true that inquiry is foreclosed as to the placer value of the ground, it becomes pertinent inquiry,—the ground confessedly having value,—to ascertain what gave it this. It has no value for townsite purposes; its agricultural possibilities likewise worthless, and yet from the standpoint of the appellate, it is valuable property. In what does its value consist? It is valuable, either because of placer deposits there, or because of the quartz leads which exist. There is no pretense whatever that it has any value whatever by reason of any placer gold existing there. All of the witnesses say this, and its history from the time it was located by Mr. Kemper down to the present time corroborates the declarations that it is utterly destitute of placer gold. This fact was just as patent in 1891 as it is today. This being true, Mr. Kemper's activities towards securing title to it, can only logically be explained upon the hypothesis that he knew of the existence of these two leads traversing the ground. While this evidence cannot be considered, as affecting the validity of the patent, it is nevertheless competent to show the comparative value of the ground, and it is competent to show the ground is more valuable on account of the quartz veins than for any placer gold which it contains.

The learned trial judge, seemingly, for its persuasive effect, referred to the fact that if these lands were known leads at the time the placer application

was made, the placer applicant would, undoubtedly, have revealed that fact, and by paying the additional sum required by law would have secured title to the leads. This circumstance is dwelt on as one suggestive that these leads were not known to exist when Mr. Kemper presented his placer application.

We submit that this circumstance possesses little, if any, intrinsic merit. We would be disposed to say that this circumstance is utterly devoid of any persuasive value. An acknowledgment by Mr. Kemper that these quartz leads existed would render invalid his location of the ground as placer ground, because, as already stated, the ground was located at the time as quartz, and the locators insisted that these locations were valid locations. An admission then, on the part of Mr. Kemper, that the leads existed would render invalid his location of the ground as placer ground. It is, likewise, suggested in the decision of the learned trial judge that the quartz locations made before the placer location were abandoned. We do not believe that this contention, on the evidence, can be successfully maintained. It is true that the original locations weren't kept alive as such, but the ground covered by these locations, at no time after its location in 1890 became a portion of the public domain. Representation work was done upon the ground until after the compromise was effected as the result of the adverse suits against the granting of the placer patent, and, as we have already stated, from the time that

Mason acquired his interest in the quartz locations in the spring of 1891, down to the present time, he has always preserved an interest in the ground in question. As we have seen, on account of the location of the ground by Mr. Kemper, and, on account of his attempt to patent same, adverse proceedings were instituted by the quartz claimants, and, as a result of the compromise in 1895, Kemper's application was permitted to go to patent upon his agreeing to deed to the quartz claimants about one-third of the ground. The next step in the proceedings was the location of a portion of the ground as the Lynne, in which Mr. Mason was interested. This occurred in 1895. In 1900 the Hornet location was made, followed in rapid succession by the Gulf and Hope, expressive of a desire to get the southerly or Hornet lead. The northerly lead was covered by the Rabbit and Olivia discoveries, seemingly, with like intent. Since that time, work has been done in various tunnels and shafts, which dot the ground. We have, then, a constant, unchanging and continuous attitude as to the existence of these leads from the time Mason purchased the interest in 1891 down to the present time. If actions speak plainer than words, we have a persistent and insistent contention on his part as to the existence of these leads, and we have actions on the part of Mr. Kemper as clearly persuasive, evidencing the knowledge on his part that these leads existed, despite his statements to the contrary.

We respectfully submit that in the light of this evidence, which stands uncontradicted in the record, the learned trial judge is in error in declaring that an abandonment of those early quartz locations occurred.

Canvassing the evidence as we encounter it, we contend that the northerly lead is disclosed in shaft No. 21; it is disclosed in tunnel 30; it is disclosed in the Rabbit discovery, and is disclosed in tunnel 31. The appellee admits that a lead is disclosed in tunnel 31 and possibly at one or two other points. We, likewise, contend that the southerly lead is disclosed in the Hornet discovery and in tunnels 34, 35 and 36 and in shaft No. 19.

It is true that all of the openings except shafts 21 and 19 are off the ground in controversy. They are, however, within the ground covered by the Butte and Boston placer location.

Appellee contends that if the leads are disclosed in the openings in question it is no proof that they exist elsewhere. The proof discloses that the leads as they are disclosed, are strong, and that they, undoubtedly, continue on their course. The tests and requirements which the appellee demands and applies, we have already in a general way declared, would render mining operations impossible of accomplishment. The application of these tests would render impossible the transfer of mining property, for, without exposure of a vein throughout the entire distance, no presumption could be indulged in that it continued beyond the

point where the eye covered it. The test demanded by appellee would render impossible even the location of the ground. The cry is "No lead unless you encounter it." The law governing the location of quartz claims is at war with such contention. The locator is only required to discover mineralized rock in place, and local requirements in the different states require some work in the way of a shaft or tunnel exposing the vein, and from these discoveries the locator is required to fix the strike of his lead and is given fifteen hundred feet of it. The geologists who testified for appellee say that a lead is where you find it, and where you do not find it, on account of its being covered, you cannot assume that it exists or extends there.

Of course, if this is correct and if the lead that is to be claimed must be exposed to view throughout its entire distance, then appellants have no standing in this controversy in so far as excepting known leads is concerned. So far as the ground in controversy is concerned, the leads are exposed only in two deep shafts, and, in order to uncover the leads in their westerly course, it would be necessary to run tunnels along the leads. Only in this way, so we are told, can we make the leads known leads. This contention, on the part of the appellee, is without merit and cannot be sustained.

In the case of

Iron Silver Mng. Co. v. Mike & Starr G. & S. Mng. Co. *supra*, the vein was nowhere disclosed on the surface, and was discovered in the running of a tunnel, and the discovery of it there was the only exposure of it when the application for a patent was made, and by the Supreme Court of the United States, this was deemed sufficient. Surely, such a contention on the part of the appellee cannot find any support in the decisions on the subject. It is at variance with the language of the Supreme Court of the United States in the case of

Iron Silver Mng. Co. v. Reynolds, 124 U. S. 374, 31 L. Ed. 466;

there the court says:

“Knowledge of the existence of a lode or vein within the boundaries of a placer claim may be obtained from the outcrop within such boundaries; or from the developments of the placer claim previous to the application for a patent; or by the tracing of the vein from another lode; or perhaps from the general condition and developments of mining ground adjoining the placer claim. It may also be obtained from the information of others who have made the necessary explorations to ascertain the fact, and perhaps in other ways. We do not speak of the sufficiency of any of these

modes, but mention them merely to show that such knowledge may be had without making hopes and beliefs on the subject its equivalent. As was observed by the court, when the case was heard before, it is better that all questions as to what kind of evidence is necessary, and we may add sufficient, to prove the knowledge required by the statute should be settled as they arise."

We have evidence that these leads are continuous; that they extend beyond the openings where they are disclosed, and that the vein matter in the different openings, although somewhat differing in appearance is a portion of the same vein.

Against this evidence, as to the existence of these leads, the mining geologists who testified for appellee advanced theories as to the cause of the mineralized material uncovered in the several openings. These gentlemen tell us there are two veins; one exposed in the Mullins tunnel and the other exposed in the north cross-cut of tunnel 31, with some indications of a vein in the Rabbit discovery shaft, and with some indications of a vein in the cross-cut in the number 9 shaft. They tell us that, undoubtedly, the vein in the Mullins tunnel is a true fissure vein, exhibiting all of the characteristics of a true fissure vein, but as indicative of their bias, they declined to say whether it extends in either direction beyond where exposed. With equal pertinacity they contend that the lead ex-

posed in the cross-cut or tunnel 31 may or may not extend beyond the place of exposure. They plant themselves squarely on the proposition that the lead is where you see it, and only where you see it, and although experience warrants the assumption that the lead continues in this case, the geologists cannot be persuaded to admit the possibility of its continuance.

When we submit to these gentlemen vein material, so designated by us, and vein material on account of the mineralization which it presents, we are advised that this copper found in the rock was deposited there by descending water, and when vein material is conceded to exist, we are advised that it is existing in a fault fissure, not in a vein fissure, and exhaustive explanations are furnished differentiating between fault fissures and vein fissures, vein quartz and vein filling, and veinlets, and so the record assumes the voluminous proportions which it does, to furnish a vehicle for this profound knowledge of geology as to the occurrences of a time millions of years removed.

One cannot leave these expositions as to vein formation without being forced to the conclusion that those gentlemen, fortunate in the possession of this knowledge, have used the same to very poor advantage. To them, the existence or non-existence of a vein is an open book, and judging from their statements, little difficulty is experienced in determining where a vein exists and its value at depth, and, yet, as the record discloses, few, if any, of them ever located a mining

claim. The question was put to many of them as to whether they did so, and the astounding fact was disclosed that no such locations were made. Mr. Mullins, we submit, with the practical experience of a quarter of a century behind him, is as competent as a geologist in a mining district to tell ore from country rock. It cannot be maintained that this witness was disposed to favor appellants, and knowingly, he would not do so, if he could possibly avoid it. His evidence shows that in many openings that he examined, he said he found no evidence of a lead, but when his attention was called to material taken from these openings, and about which there could be no doubt, he had no hesitancy in declaring the samples lead matter. Exhibit 27 he pronounced ore. The geologists said it was country rock stained. This was equally true as to Exhibit 37. His attention was called to Exhibits 30 and 31, which he pronounced vein material. These samples came from shafts 1 and 2. The geologists pronounced the material in shaft 1 a hard rib of granite, and in shaft No. 2 aplite, and so the instances might be multiplied indefinitely. As the case stands, it is a conceded fact that some leads exist within the limits of the ground patented as placer. The leads as they now exist, and as they are conceded to exist are removed, so appellee contends, some distance from the openings which were made upon the ground before the 11th of May, 1891. We, the appellants, contend that the leads were disclosed in these

openings, and the ground was of such a character that any person at or near the ground could easily and readily see the openings and the dumps which these openings brought into existence. The exhibits, exceedingly numerous, speak for themselves, and they are presented with the expectation that they will speak for themselves, and these samples will reveal the fact that the ground from which they were taken was, in most cases, highly mineralized, and, although the evidence may, seemingly, be conflicting, as we have already stated, this conflict arises by reason of the requirements of the witnesses for appellee as to what constitutes a vein, and as to how the mineralization of a fissure should occur.

We most respectfully insist that on the evidence presented, the learned trial judge should have held that the lands were known leads at the time of the placer application for a patent, and that in the case of the Point Pleasant location, the same was a valid and subsisting location when the ground was located as placer ground, and under the decision of the Supreme Court of the United States in the case of *Mantle v. Noyes*, supra, this round was excluded from the placer patent, and that this court should find for the appellants and in favor of their contention.

Respectfully submitted,

WALSH, NOLAN & SCALLON,

and

J. A. POORE,

Solicitors for Defendants and Appellants.

No. 2323.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS MASON, L. O. CLARK, JOHANNA
FARLIN, C. C. CLARK, L. P. FORE-
TELL, A. F. BUSHNELL, JOHN
DOLAN, PAT LEROUS, J. T. FITZ-
GERALD AND ELIZABETH BROWN,
Appellants,

vs.

WASHINGTON-BUTTE MINING COM-
PANY, a Corporation,
Appellee.

BRIEF OF APPELLEE.

JOHN A. SHELTON,
Solicitor for Appellee.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS MASON, L. O. CLARK, JOHANNA
FARLIN, C. C. CLARK, L. P. FORES-
TELL, A. F. BUSHNELI, JOHN DOLAN,
PAT LEROUS, J. T. FITZGERALD, and
ELIZABETH BROWN,

Appellants,

vs.

WASHINGTON-BUTTE MINING COM-
PANY, a Corporation,

Appellee.

BRIEF OF APPELLEE.

Statement of the Case.

This suit was brought by the appellee, as complainant, to determine an adverse claim to certain real property situated in Silver Bow County, Montana. The allegations of the bill necessary to be noticed here are, that by virtue of a United States patent and mesne conveyances from the patentees therein named, it is the owner in fee simple absolute of certain particularly described property, the same being a portion of the Butte and Boston placer mining claim, Survey No. 3379; that the defendants claim an estate or interest in

such land, which claims are without right and are invalid (T. 1-4).

The defendants by an answer denied such allegation of ownership on the part of the complainant (T. 5-6) and by cross-bill affirmatively alleged that on the 11th day of May, 1891, Simeon V. Kemper and Josephine Lorenz made entry in the United States Land Office, at Helena, Montana, of a certain placer mining claim designated as Survey No. 3379; that on December 19, 1895, a patent therefor was issued to them, which patent excepted any vein or lode of quartz or other rock in place bearing gold, silver, cinnibar, lead, tin, copper or other valuable deposits known to exist within the land described in the patent on the 11th day of May, 1891; that at the date of the application for such patent certain lodes, veins or deposits of mineral ore or rock in place carrying copper, silver, lead and other valuable minerals or metals were known to exist within the boundaries of such land; that the existence of such veins was, or should have been by the exercise of reasonable diligence, known to the applicants for such patent at the date of such application and that the public generally at such time knew of the existence of such veins; that the application for such patent did not include an application for any lode or vein so known to exist, and that by reason thereof such lodes and veins were excluded from and excepted out of such patent and remained unappropriated public mineral lands of the United States; that thereafter Samuel Kift and

Isaac Knoyle made a location on one of such veins of the Hornet Quartz Lode Mining Claim and R. O. Merriman made location on such veins of the Rabbit, Hope, Olivia, and Gulf Quartz Lode Mining Claims, which locations were made respectively on the 19th day of March, 8th, 15th, 16th and 19th days of May, 1900; that "the aforesaid veins lie in large part within the premises mentioned and described in the alleged bill herein and said lode claims embrace nearly all of said ground"; that the defendants, prior to the commencement of the action, by due and legal conveyance became and were at the time of the commencement of the action the owners of such lode claims; and that the complainant asserts some right or title in or to the same which claim is invalid (T. 7-14).

Such allegations of ownership in the cross-bill of the defendants is denied by the complainant in its answer to the same (T. 15-24) and to the defendants' answer the complainant filed the general replication (T. 25).

Upon the issues so framed testimony was taken. Upon such testimony and the pleadings the case was heard, Judge Frank S. Dietrich sitting, who after hearing the arguments in the case personally examined the openings and prospect holes on the ground in controversy, and part of such other openings and prospect holes as were referred to in the testimony and thereafter a written opinion was filed (T. 31-48) and a decree entered in favor of the complainant (T. 29-31) from which decree the defendants have appealed.

BRIEF OF ARGUMENT.

The Evidence.

The assignment of errors filed (T. 50-52) indicates that appellants rely upon two points for the reversal of such decree, the first of which is that on account of certain alleged quartz lode locations claimed by the appellants to have been made by third parties prior to the date of the placer location upon which Simeon V. Kemper and Josephine Lorez based their application for patent, some indefinite portion of the land covered by said application was withdrawn from entry and was not subject to disposal or sale by the government at the time such patent issued, and in consequence thereof, appellants claim that such patent so far as it embraced ground covered by such alleged lode locations (the exact amount of which is not indicated) was invalid.

The second point is that all of the ground embraced within the five lode locations referred to in the cross-bill, namely, Hornet, Rabbit, Hope, Olivia and Gulf lodes was according to appellants' contention excepted from such patent and did not pass to the patentees therein named but remained subject to location because of the existence within such lode claims of lodes or veins, the existence of such veins or lodes being known to such applicants for patent at the date of such application.

It will only be necessary to consider so much of the

evidence as was directed to the issues made by the pleadings which we have heretofore stated.

Such evidence in chief, on the part of the complainant, consisted of proof of the location of the Butte and Boston placer, the issuance of patent, conveyance from the patentees named in such patent to the complainant and oral proof showing the boundaries of the ground in controversy. (T. 57-58; 67-68).

As to the evidence offered by the defendants to overcome the *prima facie* case so made, the contentions of the appellee are, (first) that such evidence is wholly insufficient, if taken as true and if it stood entirely uncontradicted, either to entitle the appellants to any affirmative relief or to defeat the title of the complainant, but if not (second) that it is entirely insufficient for such purposes under the strict rule of proof which is to be enforced in cases of this kind, such rule requiring that such proof be clear and convincing, and (third) that as to all points as to which there is a conflict in the evidence the weight of the evidence is entirely in favor of the complainant.

A brief statement of the situation and outline of the events which led up to the commencement of this suit will help to a clear understanding of the discussion of the evidence which is to follow.

The "Butte Hill" on which is situated all of the important quartz mines in the Butte district developed prior to and in operation on May 11, 1891, is bounded on the easterly and southerly sides by a district of much

lower elevation commonly referred to as "the flat", through which flows Silver Bow Creek. The land embraced in the Butte and Boston placer (a patented placer mining claim) is a portion of such low-land lying adjacent to and easterly from said Silver Bow Creek. About a mile east of the eastern boundary of the Butte and Boston placer is the summit of the main ridge of the Rocky Mountains with an elevation much higher than the land embraced in such Butte and Boston placer. On the slopes of the hills or mountains extending down to the flat on each of its two sides the solid formation comes to the surface and is without any covering of soil or loose earth or rock. Therefore any veins which occur there may be traced by the outcrop on the surface. The loose rock and earth carried down by the process of erosion from such mountain sides has partially filled and given a comparatively level surface to the depression between referred to as "the flat," and there the solid formation instead of coming to the surface is at varying depths below the surface and any veins existing are not exposed naturally on the surface. The deposit which there overlays the solid formation is shallow at the foot of the mountain side but increases in depth as the middle of the flat is approached where it has a depth exceeding 600 feet. Whatever veins exist in the flat, of course, are unknown except such as may have been discovered by under-ground workings.

On December 20th, 1890, a location was made of the

Butte and Boston placer claim and on May 11, 1891, the locators made application for patent. All of the ground designated as the flat had been either prior to that time or was subsequently patented as placer ground with the exception of one or two agricultural entries. A great deal of the flat along Silver Bow Creek had been worked for the placer gold which it contained and in at least one place on such flat a deposit of clay acquired under placer location had been utilized for making brick. The nearest developed quartz mine to the Butte and Boston placer was distant about one and one-half miles and was on the edge of the Butte Hill and on the westerly side of Silver Bow Creek. Any veins which could then be traced by out-crop on the Butte Hill did not run in the direction of the Butte and Boston placer and so far as appears from the evidence there was no underground development which in any way pointed to the existence of any such veins in that ground. The bed-rock exposed on the mountain side to the east of the Butte and Boston placer does not show any veins running in the direction of such placer claim nor have any such been discovered there by underground development.

Some time during the summer of 1891 certain prospect holes were sunk by the defendant Mason who was then doing representation work on two attempted lode locations claimed to have been located April 1, 1890, and called Point Pleasant and Pleasant View. A portion of such holes were probably sunk before May 1st, of

that year. Mr. Mason claims that a portion of them were sunk to bed-rock, which statement, however, is contradicted by the witness Kemper for the complainant. All of them, however, were outside of the ground in controversy in this case and in the easterly portion of such placer claim. The Pleasant View discovery was within the ground in controversy in this case, but defendants practically concede that no vein was exposed there. The Point Pleasant discovery was entirely outside of the Butte and Boston placer.

Such application for patent was adversed by the defendant, Louis Mason, and others who claimed to be the owners of the Point Pleasant and Pleasant View claims covering a portion of the same ground, and they then began two suits in the District Court of Silver Bow County, Montana, to determine the rights of possession as to the land covered by such alleged lode locations. Prior to the time such cases came on for trial in the District Court, Patrick Mullins who testified on behalf of the complainant in this case became a part owner in such alleged lode locations. According to his testimony from his examination of the ground he became convinced that such alleged locations were invalid for the reason that they had no discovery of any vein upon which to base such location and the owners of the lode claims then decided to secure a compromise, if possible. Afterward such cases were compromised by which compromise judgments were rendered in favor of the placer appli-

cants, who were allowed to procure patent under an agreement to deed to the lode claimants the easterly one-third of the ground embraced in such placer location. The placer applicants did obtain patent on December 19th, 1895, and there-upon deeded to the lode claimants the easterly one-third of the ground embraced in such patent in accordance with the compromise agreement. With the exception of some work done in shaft designated as 9, on defendants' exhibit No. 1 in which shaft it is quite clear from defendants' testimony there was no vein disclosed, prior to the date of the placer application, there was no further work done in an attempt to develop any lead supposed to exist in the ground until the year 1900, although it appears from the testimony, the defendant Mason had a lease on the easterly portion of the ground and had an opportunity to do such work had he thought that it would have been profitable.

On March 19, 1900, Samuel Kift and Isaac Knoyle located the Hornet claim, the discovery shaft on which claim is in a prospect hole which according to the testimony of defendant Mason had been made prior to May 11th, 1891. It appears, however, from the declaratory statement of such location that the vein claimed to have been discovered was in a cross-cut running to the southwest, and whatever was disclosed in such cross-cut it is not claimed was exposed prior to May 11th, 1891. After the posting of the notice of location of such claim, but before the completion of the

location, the defendant Mason and his brother-in-law, defendants' witness Merriman, took a lease and bond on such claim and another attempted location over it was made in the name of Merriman which was called the Gulf. The discovery hole on that claim was about 15 feet north of the Hornet discovery. In sinking such hole a small north and south fault was encountered in the Gulf discovery. When such fault was encountered it was followed, a cross-cut being run north about 15 feet where an east and west vein was discovered, the same being about thirty feet north of the Hornet discovery shaft. No further work was then done through the Gulf discovery but a tunnel was started, work being begun on such tunnel a short distance to the west and driven in such a direction as to encounter about 30 feet north of the Hornet discovery, the vein which had been discovered, and the defendant Mason and his partner Merriman then began the work of extracting the ore found in such vein through such tunnel. Suit was then begun by the owners of the placer title covering that ground to enjoin such work and it was not until after the commencement of such suit that any connection was made between the Gulf discovery and the Hornet discovery when an effort was made on the part of Mason and Merriman to hold the ground and for that purpose to show that such vein discovered in 1900 extended so far south as to be disclosed in the prospect hole which they claimed had been made prior to May 11, 1891, and which they claimed had been again dug out to make the Hornet discovery.

Evidently encouraged by the discovery of the vein which is disclosed in the tunnel referred to, attempted locations were made of three additional claims in such a way as to cover practically the whole of the Butte and Boston placer. As bed-rock was nearest the surface on the extreme eastern portion of such placer claim, it was only in that portion that any attempt was made to claim discoveries and as the placer claim was much wider on its western side it was necessary in order to cover it in that way to spread out such claims at their western extremity. One of the claims was given a northwesterly and southeasterly course and another a southeasterly and northwesterly course, and it was considered necessary to make the five locations, although the claim of the defendants here is that only two veins were discovered and that such veins have an easterly and westerly course.

On account of such locations the complainant being the owner of the westerly two-thirds of the Butte and Boston placer brought this suit.

All evidence of the existence of veins, whether discovered before or after the date of the placer application so far as the same is based upon actual exploration is with the exception of the Pleasant View discovery confined entirely to the easterly portion of the Butte and Boston placer and outside of the ground in controversy in this case, except that the defendants claim

an exposure of such veins in shafts 19 and 21 (Defendants' Exhibit No. 1) which shafts are barely within the ground in controversy. Taking the Butte and Boston placer as a whole and including that part of it which is outside of the ground in controversy in this case, the defendants have produced no evidence which will warrant the conclusion that there was a discovery of any vein there on or prior to the date of the placer application. Such evidence is also wholly insufficient to show any valid existing lode location on any part of the Butte and Boston placer at the date of the placer application or at the date of the issuance of patent.

The testimony may be classified in a general way as relating to five different questions as follows:

FIRST: WAS ANY LODE OR VEIN KNOWN TO EXIST WITHIN THE LIMITS OF BUTTE AND BOSTON PLACER AT ANY TIME ON OR PRIOR TO THE DATE OF THE PLACER APPLICATION?

SECOND: WAS ANY SUCH LODE OR VEIN KNOWN TO EXIST ON OR PRIOR TO THE DATE OF THE PLACER APPLICATION WITHIN THAT PORTION OF THE BUTTE AND BOSTON PLACER WHICH IS INVOLVED IN THE CONTROVERSY IN THIS CASE?

THIRD: IS THERE ANY COMPETENT PROOF OF THE EXISTENCE OF ANY VEIN

OR LODE WITHIN THE GROUND IN CONTROVERSY IN THIS CASE?

FOURTH: IS THERE EVIDENCE DEFINING ANY VEIN SUPPOSED TO EXIST IN THE GROUND IN CONTROVERSY IN THIS CASE SUFFICIENT TO PERMIT THE DRAWING OF A DECREE GIVING SUCH VEIN WITH AN AREA OF ENCLOSING SURFACE GROUND TO THE DEFENDANTS?

FIFTH: IS THERE ANY COMPETENT PROOF OF THE EXISTENCE OF ANY VALID LODE LOCATION COVERING ANY PORTION OF THE GROUND IN CONTROVERSY IN THIS CASE AT THE DATE OF THE PLACER APPLICATION OR AT THE DATE OF THE ISSUANCE OF PATENT FOR THE BUTTE AND BOSTON PLACER?

FIRST.

No vein could have been exposed on the surface of the Butte and Boston placer for the reason that the entire surface of such claim is composed of wash or soil. We do not understand that the defendants make any other contention. The only intimation in the testimony to the contrary is contained in the statement made by the defendant Mason, who testified on behalf of the defendants, which statement is to the effect that on the extreme eastern portion of the Butte and Boston placer there is an appearance of rock on the sur-

face which may or may not be bed-rock (T. 98). There was no statement by this witness, however, that the portion of the bed-rock so exposed showed the existence of any vein. There is direct testimony on the part of several other witnesses to the effect that there is no exposure of bed-rock within the limits of such claim. As there was at the date of the placer application no under-ground exploration in adjacent property there could be no discovery of any vein within the limits of such placer claim except by openings on the surface. There were certain prospect holes sunk on the western portion of the Butte and Boston placer prior to such date, which prospect holes were made by the placer locators. It is not claimed that any vein was disclosed in any of them. In fact the evidence is uncontradicted that none of such holes reached bed-rock. There is only evidence of five prospect holes as to which there is any evidence in any way indicating the disclosure within the Butte and Boston placer of a vein at or prior to May 11, 1891, the date of the placer application. These are the so-called Pleasant View and Hornet discoveries and shafts 1, 2 and 9 as indicated on the map, Defendants' Exhibit No. 1. Defendants claim a vein was disclosed in the so-called Point Pleasant discovery which was, however, as already stated outside of the Butte and Boston placer. If there had been any discovery of a vein in the Hornet discovery, such discovery could not have been earlier than the 1st day of May, 1891, since

it was about that time that the defendant Mason claims he began sinking such shaft. The evidence as to the date that the shaft was sunk is of such character that a serious doubt may be entertained as to its having been sunk prior to May 11, 1891. The only evidence intimating the possible existence of a vein in the Pleasant View discovery was given by defendant Mason. The substance of his statement, however, is that he had first thought that there was a vein disclosed there, but that he afterwards discovered that he had been mistaken and that what he thought was a vein was merely an occurrence of green-stained rock in the surface wash, the prospect hole in question not having been sunk sufficiently deep to encounter bed-rock (T. 97-100). Testimony given by him upon a former trial was produced and by him admitted to be correct, which former testimony admitted such mistake as to the existence of a vein (T. 99-100). The location of the Point Pleasant discovery was not proved by competent evidence. Mr. Mason testified that he was told by a Mr. Passmore that a certain prospect hole was the Point Pleasant discovery. When it was developed that his statement as to the location of such prospect hole was based upon hearsay, complainant's counsel moved to strike out such testimony upon the ground that it was incompetent (T. 96). His testimony, however, furnishes no competent proof of the discovery of a vein at the place which he considered the Point Pleasant discovery. Concerning this matter his testimony is: "Where the notice was

posted in this cut the rock was all of a green cast, green ore stained with copper and I should judge it to run 5 per cent. In the discovery on the Point Pleasant the operator got to bed-rock" (T. 72-73). This we submit does not amount to a statement that the green ore or rock of a green cast was in bed-rock. The statement is that where the notice was posted in the cut the rock was of the character described. Such rock, however, might have been encountered in the surface wash but not in bed-rock. It may be possible that the witness meant to say that such green-stained rock was encountered in bed-rock, but he fails to make such statement definitely. The only statement which he did make is as to the occurrence of green-stained rock and ore which occurrence may have been in the surface wash.

Mr. Mason testified that in the latter part of April, 1891, shaft 9 had been sunk by him to a depth of 10 feet. Later and subsequent to 1895 and subsequent also to the compromise which resulted in the giving of a deed to the quartz claimants of the east one-third of the Butte and Boston placer, he obtained a lease on such land and did certain development work, all of which was confined to shaft 9 except that a cross-cut was then run north from it. Such samples as were produced from that shaft and connected workings were not taken from any part of it which was opened prior to May 11, 1891. They were in fact practically all taken from the cross-cut running north from such shaft where not earlier than 1895 a small vein or certain

stringers were discovered. Defendants' Exhibits Nos. 7, 33 and 85 were all taken from the north cross-cut from such shaft (T. 97, 159, 711). The opening made at that place of the extent which Mr. Mason testifies that it was made prior to May 11, 1891, was not sufficient to show the existence of anything which might be called a vein. Mr. Mason's testimony contains the statement that the shaft was sunk in vein material, Defendants' Exhibit No. 100 he said came from the outside of the shaft and some distance from the walls of the shaft, Defendants' Exhibit No. 109 he claims was taken from the bottom of the shaft in 1895 or 1896 and thrown on the dump near the shaft where it lay until it was obtained by him in December, 1911, and produced in evidence (T. 993). No effort was made to produce any samples actually exposed within the walls of the shaft within 10 feet of the surface and no question was asked by counsel for the defendants calling for any statement as to the character of the material which composed such walls. The complainant, however, caused the lagging to be removed from the east side of the shaft and Mr. Barker, a witness for the defendants, in response to a question asked by complainant's counsel stated that no vein was exposed there (T. 787). If any vein had existed there, it would have been exposed in such wall since the supposed course of the veins are easterly and westerly. H. J. Mason, a witness for the defendants, stated that he saw the opening made by this pros-

pect hole when it was sunk in 1891 and that no vein whatever was disclosed there (T. 190). Complainant's witnesses testified as to the existence of certain small veins and stringers in the cross-cut north from shaft 9. Their dip was such, however, that they would not be encountered in sinking the shaft (T. 1113). All of the witnesses called for the complainant testified as to the absence of any vein in that shaft. The failure on the part of the counsel for defendants to question witnesses called on their behalf as to the character of material exposed in that portion of the shaft which was sunk prior to the date of the placer application or to show the character of the material found there amounts to an admission that no vein was so exposed. Whatever weight, under the circumstances, is to be attached to the statement of the defendant Mason as to the existence of vein material, is entirely overcome by contradictory statements made by H. J. Mason and the witness Barker, both witnesses for the defendants. If the consideration of the defendants' testimony leaves any doubt as to the point, it is made entirely clear, in our judgment, by the testimony of the witnesses for the complainant. On this point the testimony of Mr. Mullins is especially valuable, since he examined the openings which existed on the ground in 1895 at which time he was part owner of the Point Pleasant and Pleasant View attempted locations and was then interested in showing the existence of veins and who testified that at that time there was no vein exposed.

For the purpose of showing more clearly the character of any material exposed in shafts 1 and 2, Mr. Mills, a witness for the complainant, testified that shortly before the commencement of the taking of the testimony in this case in December, 1911, he sunk both shafts, 1 and 2 to an additional depth. When he began working in such shafts they had the appearance of being recently cleaned out. They had never been previously sunk to a greater depth than they were when he began such work. Shaft 1 then had a depth of 12 feet and shaft 2 had a depth of 9 feet. He sunk shaft 1, six feet deeper and shaft 2, 7 feet deeper. Shaft 2 when he began work on it had just reached bed-rock on one corner (T. 1553-1554). Everything was disclosed in those shafts at the time of taking testimony that could possibly have been disclosed in them prior to May 11, 1891, and in addition also that was exposed which was opened up by the deepening of such shafts. It appears from defendants' witnesses that there is a showing of white granite, otherwise known as aplite in shaft 2. This rock, like gray granite, from which it differs in color on account of the absence of the darker materials, composes a part of the country rock in the Butte district, occurring, however, in greater quantities in some portions of the district than in others. As it occurs in the earth it bears no resemblance to a vein, at least not to such veins as are found in the Butte district, except that it sometimes occurs in dikes of more or less regular shape.

A miner who has not made any special study of rocks might by simply examining pieces of iron-stained aplite produced in the courtroom, mistake them for material which came from a vein, but there was no witness called in this case, either for the complainant or defendants, who might properly be classed as a miner who did not state that the occurrence in shaft 2 was aplite and not a vein or vein material. Such was the testimony of witnesses Watson and Barker for the defendants. These witnesses identified as aplite Defendants' Exhibits Nos. 31 and 57 produced by other of defendants' witnesses as samples of the vein material found there. Witnesses Watson and Gage, for the defendant, testified as to the absence of any vein in shaft 1. Mr. Barker did, however, testify that there occurred in the bottom of that shaft as it had been deepened by Mr. Mills what he called a vein having a width of about four inches, but which was not traceable, however, up to the surface of bed-rock. He produced a sample (Defendants' Exhibit No. 77) (T. 699). Such sample he says contains iron oxide, some altered granite and probably also quartz (T. 699). The statement of this witness that such material constitutes a vein must be considered in the light, however, of other statements in his testimony as to what is necessary to constitute a vein. His statement is that mineralized rock in place is a vein without regard to its value and without regard to whether the indications are sufficient to justify a miner to follow it in the pursuit of ore (T. 834-775).

It is easy to understand how a person might mistake for vein material samples taken from an aplite dyke near the surface where the broken rock is more or less iron stained by the iron coming from adjacent gray granite. Iron according to the testimony is one of the constituents of gray granite and when the granite is broken up, as it frequently is near the surface and is subjected to the action of the atmosphere, the iron becomes oxidized and spreads more or less to adjacent rock and gives it an iron-stained appearance. In the Butte district one of the principal characteristics of the veins in the oxidized zone is the iron stain due to the oxidation of the iron in the vein, all of the veins carrying more or less iron. The complainant's witness Mullins when first shown in the courtroom Defendants' Exhibits Nos. 31 and 57 which were taken from shaft 2 as well as certain other samples of aplite taken from other portions of the Butte and Boston placer, made such a mistake, but corrected such statement after visiting some of the places from which such samples came (T. 558). Mr. Barker, however, defendants' chief witness pronounced them aplite and not vein material. To the unpracticed eye the resemblance of such samples to vein material may be seen by comparing them with Defendants' Exhibit No. 112 which was a sample of vein material produced by the witness Warner from the oxidized zone in the Motheral vein. (T. 1260.)

It is well to notice in this connection, however, the

fact that notwithstanding such superficial resemblance, the trained eye can readily distinguish. All of the mining engineers who testified for complainant were shown a vast number of samples on cross-examination but were able in every instance to tell which of them came from a vein. Their testimony explains that while the principal constituents of aplite is the same as that of vein quartz, namely, silica and that there is a similarity of color that there is a structural difference observable under the magnifying glass by which the two can be readily distinguished. The appearance of the unstained aplite may be seen by examining complainant's exhibit No. 21 produced by witness Winchell from the country rock lying within fifty feet to the west of the Hornet discovery and in the course supposed by the defendants to be followed by the vein which they claim is disclosed in that shaft (T. 246). According to Mr. Winchell, miners have sometimes mistaken aplite dikes for vein quartz. It is not to be supposed, however, that since such mistakes have become general knowledge there is any likelihood of the experienced miner in the Butte district mistaking an aplite dyke for a vein. Except for the occurrence of an iron-stained silicious rock within walls, practically all the characteristics of a vein would be lacking in the aplite dyke. The witness Winchell as well as several other witnesses have indicated to some extent the dissimilarity.

Complainant's witnesses, Kennedy and White,

though only qualified to give an opinion by reason of their experience as practical miners, testified that there was no vein in either shafts 1 or 2. Their testimony on cross-examination is sufficient to show that a miner of only limited experience would not be so far misled as to sink on anything occurring in either shafts 1 or 2 with the expectation of finding ore.

Concerning shaft 1 Mr. Winchell testified for the complainant that the only thing disclosed there is country granite (T. 241). He produced a sample from the bottom of the shaft (Complainant's Exhibit No. 18). A brownish stain appearing on the sample is, he says, due to the oxidation of the iron contained in the granite and has nothing whatever to do with vein mineralization (T. 241), although the same kind of brown discoloration might be produced by the oxidation of iron pyrite. This witness having been shown defendants' exhibit No. 5, a sample of material said to have been taken from shaft 1, said concerning it: "That is rotted granite stained chiefly by iron. There is a little reddish brown coat upon some of the pieces which may be hematite or hematite mixed with cuprite. In speaking of cuprite I mean in common terms red oxide of copper. It is derived just as the iron from the rotting of the rocks and the assembling of the copper and the iron upon joint fractures and coating the surface of the fragments of the rock either in the wash or below it." (T. 242.) There is no vein or vein mineralization of any sort whatever in shaft 1 (T. 242).

Concerning shaft 2 this witness says that it is in granite somewhat rotted and discolored by weathering and that a little aplite shows. It doesn't show a vein or any stringer of quartz or mineralization (T. 243).

The statements of Mr. Winchell were corroborated by testimony of the other witnesses for the complainant upon whose judgment the court will, by the reading of their testimony, be convinced that it may place reliance.

The Hornet discovery, together with the connected openings, which connected openings were begun to be made about ten years after the date of the placer application are shown on the maps, complainant's exhibits Nos. 15 and 16. The position of the Hornet discovery is also shown on defendants' exhibit No. 1 and complainant's exhibit No. 14. The tunnel running in a westerly direction about thirty feet north of the Hornet discovery is referred to in the testimony as the "Mullins tunnel" and was run by Mason and Meriman as heretofore stated in 1900. Mr. Mullins sank the shaft connected with it, which shaft is referred to in the testimony as the incline shaft. In considering the testimony in connection with the Hornet discovery, the court should keep in mind the fact that the Hornet discovery has been once filled up and afterwards re-sunk, but not exactly in the same place as when originally sunk, and since having been re-sunk the shaft has been considerably deepened and its size from time to time enlarged. A cross-cut also has

been run in a southwesterly direction at a depth of seventeen feet below the surface. A description of the connected workings and time when they were made has been heretofore in part given. The work of making such connected workings began in the year 1900. The first work done after the re-opening of the Hor-net shaft and the running of a cross-cut to the south-west was the sinking of the Gulf discovery to a depth of about 24 feet, and the running of a cross-cut north from the Gulf discovery. Next came the running of the Mullins tunnel so as to connect with the north end of such cross cut, and later the extending of such cross-cut south of the Gulf discovery so as to connect with the Hornet discovery. Still later came the sinking of the incline shaft on the vein which showed in the Mullins tunnel (which vein had a width of three or four feet), and the stoping out of the ore within the walls of such vein to a depth of 200 feet. Lastly the Hornet discovery was deepened and a cross-cut run north from the bottom of it so as to connect with one of the stopes on such vein and a cross-cut run from the bottom of such shaft as deepened in a southerly direction.

For the purpose of showing the existence of a vein in the Hornet discovery the defendants introduced certain testimony showing the presence of mineral there. Their principal effort, however, appears to have been to show some connection between such mineralization as was disclosed in the Hornet discovery with the Mul-

lins vein. In order to show such connection, testimony was offered to show that the ground which lay between the so-called Hornet discovery and the Mullins vein was all mineralized, and further that certain streaks along the northerly wall of the Hornet discovery shaft which are more highly mineralized than the surrounding earth could be traced into the Mullins vein and that they are stringers connecting with such vein.

The complainant's witnesses do not dispute the existence of a small amount of mineral disclosed in the walls of the so-called Hornet discovery. As to this point the main controversy between them and most of the witnesses for the defendants is as to the extent of such mineralization. The testimony of the complainant's witnesses is to the effect that in the Hornet discovery such mineralization is slight and that it is shown by its character and that of the surrounding country to be a mere superficial deposit, and is utterly valueless, and being a mere superficial deposit would not justify a miner to sink or to do further development with the expectation of finding ore. Also it lacks such definite boundaries as are necessary to constitute a vein. Their testimony is further to the effect that there is absolutely no connection between any mineralization in the Hornet discovery and the Mullins vein and that such mineralization did not have its origin in any mineral contained in such vein or any vein.

For the most part defendants' witnesses admit that such mineralization as is shown in the Hornet shaft

is of no value. They admit that the Mullins tunnel and the incline shaft shows at least one well defined wall, the same being the hanging wall of a vein, such hanging wall being about thirty feet north of the Hornet shaft. The defendants' chief witness, Mr. Barker, admits that two walls are disclosed in the Mullins tunnel. The testimony of this witness strongly indicates the existence of a vein in the Mullins tunnel but not to the south of it. He repeatedly refers to the occurrence in that tunnel as "the vein." He said: "The very widest place that I could find in that tunnel between two walls is two feet and that is just east of the point where in the back it gets into the wash. A little bit east of that where *the vein* is dislocated for a distance of one foot it shows a throw to the south. *The vein is about one foot wide*, but nowhere east of that do I find more than eight inches and in places I do not find any distance between the walls." (T. 721.) To the same effect is the representation undertaken to be made on the map Defendants' Exhibit No. 90 by this witness of that which occurred in the Mullins tunnel (T. 721). This represents the walls of the Mullins vein and also the north and south fault dislocating such walls (T. 722). Concerning the map he testified: "Beginning at the face of the tunnel and going to the west it represents *the vein* as I can see it between the walls at the bottom of the tunnel. Just west of the winze where the vein is broken I could not see the walls of the vein and the red marking just to the west of where

the vein is broken shows its size in the top or back of that tunnel" (Tr. 722). This witness also stated that the fault shown in the floor of the cross-cut running from the Mullins tunnel as far south as the Gulf discovery is correctly represented on complainant's exhibit No. 15. His theory as to the source of the mineralization of the Hornet shaft is stated as follows: "It is possible, and I think it is true that the streak in the Mullins tunnel was one along which the vein solutions flowed and enriched that to a greater extent, but thereafter, or possibly at the same time the replacement of the copper by the granite both to south and north of that point was made which facts are similar to those that are found in the mines on the west side." Defendants' witnesses claim that portions of the earth or rock shown on the walls of the Hornet shaft run as high as two per cent. It is not contended, however, that it could be treated, the value not being sufficiently high to allow it to be profitably treated in a smelter without concentration and the mineral being too light to permit concentration by water. On that account the methods of concentration by water now in use would not serve to separate the mineral or mineral bearing rock from the waste material.

The defendants do not claim that the samples taken by them are representative or are intended as average samples of any considerable portion of the earth or rock disclosed in such shaft. They were taken merely with the idea of showing the richest samples which could be found (T. 169).

There is some testimony on the part of the defendants that on the north side of the Hornet shaft and near the foot of a cross-cut which runs to the north there is a streak which is more highly mineralized than the rock on either side of it. Mr. Watson stated that it is a flat lying stringer (T. 425), while Mr. Barker stated that it had a dip of about forty-five degrees to the north and he undertook to connect it with another streak shown in the cross-cut running north from the bottom of the Hornet shaft and gave the opinion that such streak could be traced into the Mullins vein (T. 792).

In view of the admission of defendants' witnesses of a fissure both walls of which were disclosed in the Mullins tunnel and the contention that mineralization which was originally confined to such fissure had so affected the country rock to the south as far as the Hornet shaft as to change such country rock into vein material, we are unable to perceive in what way the case of the defendants would be benefited by showing the existence of such a stringer connecting with the Mullins vein. Evidence on the part of the defendants tending to show the existence of such a stringer tends to disprove their contention as to such extension of the Mullins vein. It is evident that the defendants consider that it is essential to the making out of their case that they show either that such stringers connect with the Mullins vein or in some other way that that which is shown in the walls of the Hornet shaft is a part of such vein. We are unable to see how

their case would be strengthened if they were to succeed in such contention, since the decision of the case can only be affected by what was disclosed in the Hornet shaft to the extent that it was opened up on or prior to May 11, 1891. If what was then disclosed there is in fact a vein they should be able to show that fact without the aid of anything disclosed by subsequent development. If what was then disclosed in the Hornet shaft was not sufficient to show the existence of a vein then they cannot claim that a vein was discovered at or prior to the date of the placer application. If the showing in the Hornet shaft to the extent that it was opened up on or prior to the date mentioned was not sufficient to justify exploitation and development then the case of the defendants is not aided by showing that if such development had been further extended it would have encountered material which would have justified such exploitation.

While admitting that there are apparent walls of a vein shown in the Mullins tunnel the witnesses for defendants, with one exception (whose testimony will be hereafter referred to), contend that such walls do not mark the real boundaries of the vein. They claim that it extends sufficiently far south to embrace the Hornet shaft, but they are utterly unable to say how much further it extends in a southerly direction or to what distance it extends in a northerly direction. A cross-cut runs southwest from the Hornet shaft, 30 feet below the surface, and a cross-cut runs

southerly from the bottom of such shaft, both of which show through their full length the same mineralization that is shown in the Hornet shaft.

Defendant Mason testified that he cannot say that there is any hanging wall shown in the Hornet shaft (T. 102). He makes no contention, of course, that any foot wall is shown because according to his theory that would be found some place to the north. The testimony of defendants' witness Watson on this point is as follows: "I did not find any evidence of any wall in the Hornet discovery itself. In this drift that runs to the southwest there is a talcy seam that might be taken for a wall" (T. 316). In another part of his testimony he said: "I wouldn't say that the foot wall might be a thousand feet north. I wouldn't say that at all. This is all probability. I say the foot wall is not shown there. The hanging wall is just about as indefinite as the foot wall. I hardly think that the hanging wall is disclosed in the Hornet shaft at all or in any cross-cut which runs in a westerly or south-westerly direction from the Hornet shaft" (T. 315-316). He also says that the talcy seam referred to he did not consider as a wall and that the hanging wall is some indefinite distance further south. It might be one thousand feet or it might be anywhere (T. 315).

The defendant Clark in testifying concerning the Hornet shaft and the existence of walls, and being particularly questioned on cross-examination as to the existence of a wall said: "Well it looks to the south

there as though it is not so highly mineralized as it is on the other three sides of the shaft."

Witness Barker admitted that if definite boundaries are necessary to constitute a vein that there is no vein shown in the Hornet shaft (T. 773).

Defendants' witness Gage who testified as to the existence of a vein in the Hornet shaft says that definite boundaries are not necessary to constitute a vein (T. 568).

Defendants' witness Clark said: "I do not think there is a visible wall in the Hornet discovery shaft." (T. 299.)

Defendants' witnesses not only were unable to fix any definite boundaries for the mineralization that is disclosed in the Hornet shaft, but their testimony as a whole, indicates that the same kind of mineralization extends through a very large but indefinitely defined portion of the adjacent country and not only shows the fallacy of the theory advanced by Mr. Barker that the mineral which had filled the fissure shown in the Mullins tunnel had attacked the adjacent country rock to the south and by the process of replacement had converted into ore that which was originally granite, but such testimony also tends to support the statements made by complainant's witnesses as to the source of such mineralization.

Defendants' witnesses do not claim such slight mineralization as occurs in the Hornet shaft is different in character from the mineralization which is found

over a large extent of adjacent territory. The witness Barker admits that where the Hornet shaft now is there was at one time over-laying granite to the extent of at least several hundred feet, that such granite contained copper in the form of calchopyrite in minute particles disseminated more or less evenly throughout the mass and that the copper so released by disintegration and oxidation remains as a superficial staining of the district. Such copper appears now in the forms of silicate and oxide of copper.

The testimony of the defendants' witnesses is sufficient to indicate the occurrence of chrysocolla and cuprite in the surface wash, in cracks in the country rock near the surface and to some extent throughout the mass of the granite near the surface in the territory embracing a somewhat extensive scope of country in the vicinity of the Hornet shaft and that such occurrence is a peculiarity of that portion of the Butte district. Defendant Clark states that the occurrence of chrysocolla is peculiar to that vicinity. He testified as to the existence of pieces of green-stained rock with rough edges indicating that it had not traveled far in the western portion of the Butte and Boston placer (T. 588). He testified that he operated the Pacific which almost immediately joins the Butte and Boston placer on the east and is less than one hundred feet east of the Hornet shaft. His work there began in the spring of 1899 and ended in 1902, since which time it has not been worked. He testified as

to the existence there of what he terms a fault and says concerning it: "I couldn't say we had any walls. The cross-cut is in what I would call vein material. We cross-cut north on the fault on the three hundred. We did not get through it. We run a cross-cut sort of southeast on the fault on the three hundred. We did not get through the fault there. We were cross-cutting practically north and south. The cross-cut was in what Mr. Winchell called aplite, broken up in places and seamy; rich ore in seams" (T. 608-609). The only ore shipped from there was a wagon load.

The work on the Bullwhacker to the south was on the continental fault which runs north and south and passes between the Hornet discovery and some portion of the Pacific claim. Defendants' witness Barker said that there was a green-stained rock mined on the fifty-foot level, but the green stain disappeared entirely on the four-hundred foot level (T. 738). The material at the four hundred foot level was a clay-like substance. (T. 738-740.) Clay is the kind of material you would expect to find in a fault. The chrysocolla found in the ground in that vicinity but outside of the Hornet shaft and connected workings may be due to descending solutions, that is by the rainfall and melted snow carrying copper in solution sinking into the ground and coming into contact with an excess of silica (T. 765). He states that aplite contains from ten to fifteen per cent. more silica than gray granite and that the stain in the cross-cut from

tunnel 31 and outside of the vein which exists there may have been formed in that way, and he further states that chrysocolla and cuprite are not soluble in water at ordinary temperature and pressure.

Witness Mason testified to having seen chrysocolla and cuprite in the earth above bed-rock in the so-called Pleasant View discovery. His testimony is that on the 14th or 15th of April, 1891, that he found about fifty pounds of copper ore at the collar of the shaft which had been thrown out in sinking. This ore was very green in color and pieces broken off from it contained red oxide. In the testimony of this witness given in a former trial and introduced in evidence in this case, he said concerning Pleasant View discovery: "This month it was when it was cleaned out and sunk down eighteen inches or so deeper and showed that it was not a regular vein but a body of quartz that was deposited there, then I came to the conclusion that there was no lead there in sight" (T. 1089).

In sinking shafts 5, 6 and 3 in which he doesn't contend that any vein was disclosed, he found copper stain. Pieces of red copper ore were found promiscuously over the surface of Butte and Boston placer and on the adjoining claims. He found cuprite and chrysocolla in the material taken out of shaft 9 and he stated that he sunk it from a depth of 20 feet to 48 feet (T. 1001). There was no wall exposed in sinking that shaft.

Defendants' witness Dean testifying concerning the

general dissemination of the green-stained material said: "Well it is below bed-rock, you wouldn't say it was float."

We have already referred to the admission on the part of the defendants' witness Barker to the effect that some of the copper in and in the vicinity of the Hornet shaft and connected workings has its origin in the calchopyrite disseminated through what was once the overlaying granite. That being true, why look to the Mullins vein as the source of any part of such copper, there being no evidence except its mere proximity indicating that it is the source. Of course, the fact that there is more copper in the country rock immediately adjacent to the Mullins tunnel than there is in the country rock as far south as the Hornet shaft doesn't indicate that the copper in the vein has become to any extent distributed through such country rock. The evidence shows the occurrence of several fault fissures, one of which is shown in the floor of the cross-cut running south from the Mullins tunnel as far south as the Gulf shaft. Since such fault fissure would furnish a channel for the free circulation of water, it would, of course, contain more copper if we assume that the copper came from the calchopyrite of the granite, for according to our assumption such copper becomes dissolved and is carried and deposited by the water. Since the fault fissure would carry more water than the more or less solid granite on each side there would naturally be in such channel

a greater deposit of chrysocolla. As many of the samples of defendants' witnesses were taken along the floor of such cross-cut and in the course of such fault (T. 217), they would naturally show more copper near the Mullins tunnel, as the occurrence of such fault is shown north of the Gulf shaft but not south of it. If some of the mineral in the vein was carried into such fault fissure it would not in that way reach the Hornet shaft, for the fault fissure runs to the north of such shaft. It is evident, however, from the testimony that the mineralization of the Mullins vein did not extend into the fault fissure and was not carried into the adjacent country through such fissure. It is evident that the vein fissure was formed before the fault fissure, for the reason that the vein fissure is cut and dislocated by such fault. Not merely was the vein fissure cut by such fault, but the vein filling was also cut, which is shown by the fact that there is a dislocation of the vein filling as well as the walls of the fissure. As the line of fracture made by the fault within the vein has not become obliterated it is not to be supposed that a portion of the mineral of the vein filling has been carried into the fault fissure.

The effort of the witness Barker to show that that which was country rock south of the Mullins vein has been converted into ore by the process of replacement entirely failed. It is conceded by this witness that when ordinary gray granite is subjected to the action of a solution of copper sulphate and the granite changed

into ore by replacement, that the darker constituents, that is the ferro magnesium is carried away and is replaced by copper and the granite so changed into ore is distinguishable by the absence of the dark specks which the granite contained before. It is admitted, however, by defendants' witnesses and otherwise abundantly proved that the rock forming the walls and bottom of the cross-cut south from the Mullins tunnel has no such appearance. It is not contended that the samples taken by the complainant's witnesses from the Hornet shaft and the cross-cut north of it do not represent the main body of the material found there.

Mr. Mayger, a witness for the defendants, states positively that there is no vein in the Hornet shaft. He passed through all of the openings connected with it (T. 375-376). The only vein that he states that he saw is a vein about five or six feet in width which was encountered in a stope near the Mullins winze, which is the same vein shown in the Mullins tunnel, but at a greater depth. He said: "I think there was five or six feet of ore there that would show ore. I didn't notice especially what the country rock on both sides was, but I rather think it was granite" (T. 375-376). The width given by him to the vein is about as represented on complainant's exhibit No. 15. If such vein extended so far south as to reach the Hornet shaft the width must have exceeded thirty feet.

If the case is considered on defendants' testimony alone it is evident that the conclusion must be that

there is no vein in the Hornet shaft and there was none shown in any opening made there or near there, on or prior to May 11, 1891. The fact that there was not and is not any such vein there is established by the testimony of complainant's witnesses in rebuttal beyond controversy. It will not be necessary here to undertake to give anything like a detailed statement of such testimony. The geology is represented on the maps, complainant's exhibits Nos. 14 and 15, which maps represent the facts as they were testified to by eight or more witnesses for the complainant, which witnesses represented all of the different grades and classes of employment in the mining industry.

The testimony of witness Winchell may be taken as representative of such. He testified to an experience as a mining geologist extending over a period of twenty years. From 1898 to 1906 he was mining geologist for the Anaconda Copper Mining Company and for fourteen years past has been familiar with the underground developments and the geology of the Butte district. A few weeks before he gave his testimony, which was on January 12, 1912, he made an examination of the ground in that vicinity. His statement as to the source of the staining and slight impregnation of the country rock in that vicinity with copper of a greenish color and the deposit in the joint cracks and in the fault fissures near the surface of small quantities of chrysocolla and cuprite, is that the granite which in part composes the country rock,

contains until eroded and acted upon by the oxygen in the air, minute particles of copper in the form of calchopyrite, and that in the vicinity of the ground in controversy, on account of the quantity of aplite, this copper when released by weathering, forms chrysocolla or silicate of copper and cuprite or oxide of copper, which on account of their insolubility, are not carried away by the action of surface waters. These substances are deposited near the surface in cracks and permeate the country rock near the surface to a greater or lesser extent, the stain being carried in any rock that will absorb moisture, and such staining which occurs in the country rock near the surface, of course, forms a part of the wash which overlays the bed-rock. The wash itself is composed of portions of broken up and disintegrated country rock which was originally, of course, bed-rock. His description of the Hornet shaft, the Mullins tunnel and connected workings is as follows: "These workings are shown on a large scale on complainant's exhibit No. 15. The Hornet tunnel passes into the bed-rock at a distance of about eighty feet from its portal. It here encounters what I have been accustomed to call the Mullins vein. I believe it has been referred to as the south vein in this hearing and it follows this vein to its eastern face, a distance of about 120 feet. The vein has a rather flat dip to the south. It varies in width from a few inches to a few feet. It has a very well marked hanging wall and an equally good

foot wall. It dips to the south at an angle of about sixty degrees. The Mullins shaft to which I referred as having been sunk several years ago and examined by me at the time, followed this vein upon its dip. I think the upper part of the shaft passing through the wash was vertical and then it followed the dip of the vein, some two hundred feet, at which point there was a drift extending to the east. The vein still retained its flat dip to the south and contained a foot or eighteen inches of copper ore. The mineralization in this vein is that commonly found in the veins of this camp. It contains quartz and the copper minerals. Near the bottom or east from the bottom of this shaft I recall the ground had caved in from the hanging, making what is practically a cross-cut into the hanging. The country rock disclosed there was a very excellent article of granite, very little discolored or stained by copper. There are two or three small fault slips across the vein in the Hornet tunnel. One of these which is apparently the most persistent and important is followed in the cross-cut extended from the Hornet tunnel to the south toward the Hornet discovery. This fault strikes north, ten degrees east and dips east seventy degrees. It contains the usual fault filling and some clay and the clay has been impregnated with chrysocolla. The country rock south from the vein in this cross-cut is granite and the granite itself is somewhat copper stained. There are also two or three little seams con-

taining small kidneys and streaks of high grade material, cuprite and chrysocolla. One of these seams I noted particularly between the Hornet discovery and the Gulf discovery, upon the eastern side, which had been very carefully excavated and picked out. The Hornet discovery shaft has been sunk to a depth of $37\frac{1}{2}$ feet; through wash or surface debris to the depth of about 24 feet and below that point in granite. At the bottom of this shaft, that is the Hornet discovery shaft, there is a little cross-cut to the southwest all in copper stained granite. There is also a cross-cut to the northeast which reaches the Mullins vein at a distance of about eighteen feet from the Hornet discovery shaft. Between the shaft and the vein, the cross-cut is entirely in copper stained granite with a little cuprite in the joints. There is no vein disclosed in the workings of the Hornet discovery shaft, either upon the level of the Hornet tunnel nor the level at the bottom of the shaft. The level at the bottom of the shaft is exhibited with its geology on complainant's exhibit No. 16. There has been a small raise extended from the lower level upward upon the vein to connect with the Hornet tunnel. The vertical distance is probably about twelve feet. The vein, the Mullins vein, that is shown on the lower level has a width of from twelve inches to two feet and has the usual characteristics. The same small fault to which I referred as striking north, ten degrees east and dipping east seventy degrees, is seen in the lower level.

It has here a slightly steeper dip to the east. The dip of the vein is the same, south sixty degrees" (T. 249-252).

Concerning the question of an enlargement of the Mullins vein by the vein material attacking the adjacent country rock and changing it into ore by the process of replacement, the witness testified: "No there has been no enlargement of the vein. The country rock would be just as much discolored if there was no vein there and it would not mean a vein" (T. 252).

Concerning the occurrence of chrysocolla generally in the district, he said: "There is also over a large section of the country north, east and south of the Butte and Boston placer a very unusual discoloration of the country rock by chrysocolla. The rock is stained green. The chrysocolla has even been gathered together into little intersections of joints and into fractures which the rock contains. It has entered and discolored and to a certain extent mineralized the aplite. Its abundance has attracted the attention of all observers. Cross-cuts hundreds of feet in length, at no greater depth than fifty or seventy-five feet, show the entire country rock contains a green discoloration and sometimes little masses of ore; and chrysocolla is not the only copper mineral but there is also an occasional little seam or kidney of cuprite" (T. 237-238).

In discussing the testimony of the defendants' witnesses reference was made to certain statements as to the existence of a stringer which could be traced

from the north side of the Hornet shaft into the Mullins vein. We have already noted the testimony of the witness referring to the deposit of chrysocolla and cuprite in joint cracks and in fractures in the country rock. The occurrence of the joint planes was explained by this witness as follows: "When the ground cooled it participated in that contraction of which I spoke relative to cooling bodies and the contraction of the granite upon cooling produced throughout the mass of the granite joints. These joints frequently intersect or abut against each other making a honey-combed structure in the granite upon a larger scale, and a larger joint against which many of the smaller joints terminate is called a master joint" (T. 284).

This witness drew a diagram marked by the examiner for identification (Defendants' Exhibit No. 55), upon which is roughly illustrated the normal jointing of granite (T. 284).

For the complainant the witnesses Mullins, Kemper, Wilson, Warner, Fisher, Linforth, Berrien, White and Kennedy all testified as to the absence of any vein in the Hornet shaft.

The defendants' witnesses described the occurrence of joint cracks and the impossibility of tracing any seam occurring in the Hornet shaft into the Mullins vein or even as far as the lower cross-cut. Speaking of the lower cross-cut the witness Wilson said that on the right hand side, going north, is a seam containing chrysocolla and cuprite. It has no significance.

for it don't appear on the other side of the cross-cut.

Witnesses Linforth and Berrien took certain samples intended to represent the character of material shown in the Hornet shaft and the cross-cut to the north. Complainant's exhibit No. 31 was taken from the east side of the upper cross-cut beginning at a point three feet from the side of the tunnel and extending to a point seven feet from the side of the tunnel, one piece being taken from each foot of the distance covered, which practice was followed in taking all of the other samples referred to (T. 1368-1369). Complainant's exhibit No. 32 was taken from the east side of the same cross-cut covering a distance of twelve to sixteen feet south of the Mullins tunnel (T. 1370). Complainant's exhibit No. 33 was taken from a place in the same cross-cut extending from sixteen to twenty feet south from the Mullins tunnel (T. 1370-1371). Complainant's exhibit No. 34 was taken from the same cross-cut and from a place extending from twenty to twenty-four feet south of the Mullins tunnel (T. 1371). Complainant's exhibit 35 covered the remaining distance to the Hornet shaft (T. 1372). Complainant's exhibit No. 36 is a sample of five pieces taken from the east side of the Hornet discovery shaft and is a continuation of the last named sampling (T. 1373). These witnesses also took samples for assaying. The result of such sampling and the analysis was represented on a map or sketch representing a cross-section through the Gulf cross-cut and is marked Complain-

ant's exhibit No. 37 (T. 1374). All of the samples are representative of the material from which they were taken (T. 1367).

The witness Kennedy described the mineralization in the Anaconda vein beyond the original walls of the fissure and described the ore there as white in appearance. Being shown defendants' exhibit No. 113, a piece of unaltered granite, he said that the ore there was whiter in appearance than such granite would be with the dark specks removed. The ore so formed by replacement in the Anaconda vein runs from four to five per cent. in copper. No green stain, whatever, was observable in it (T. 1551).

We consider the testimony of witness Mullins of special value, since in 1895, he was as already stated, a part owner in the so-called Pleasant View and Point Pleasant claims and on account of the litigation then pending was compelled with his associates to show the existence of a vein in order to support his claim of title by virtue of such attempted locations. He has no interest in the outcome of the present suit and is entirely disinterested. He states that in 1895 he made a careful examination of the ground and all prospect holes open and that he found nothing in the way of a vein which in his judgment would support such lode locations, and that the defendant Mason was then a partner with him and that Mr. Mason did not then claim that any vein existed outside of the Point Pleasant and Pleasant View discoveries. It appears that

one of his partners, Judge Hamilton, was a practicing attorney, and, of course, it was well known to Judge Hamilton (and Mr. Mullins and Mr. Mason are also presumed to know), that the Pleasant View location could be sustained on a discovery in the Hornet shaft if it was within the boundary of such attempted location and a vein had been discovered there prior to the date of the placer application and definitely ascertained and of sufficient value to justify exploitation. Mr. Mullins testifies, however, that in view of the situation he and his associates decided that they had no cause of action and decided that their best course was to endeavor to obtain a compromise of the litigation.

While Mr. Kemper is interested in the present litigation, we submit that under the circumstances, his testimony is entitled to great weight. He was one of the parties opposing Mr. Mullins in the litigation pending in 1895. Both he and Mr. Mullins testified that after the compromise of that litigation the subject of making lode locations covering the ground so as to prevent further litigation was discussed and the idea was abandoned on account of the fact that nothing could be found upon which in their judgment a valid lode location could be made. Both of them, of course, knew that the subsequent discovery of such lodes might be a source of litigation and it stands to reason that if such lodes were then known to exist or were discoverable by reasonable effort, that such lode locations

would then have been made, and the fact that they were not made, is very persuasive evidence of the fact that none were known to exist.

The discussion of the evidence so far has related to the existence of veins discovered within the limits of the Butte and Boston placer on or prior to May 11, 1891. Before patent was issued covering the Butte and Boston placer, the placer applicants were required to make proof that the ground was in fact valuable for that purpose, and of course, the issuance of patent conclusively determined that such ground in fact was placer ground. Counsel for defendants asked certain witnesses concerning the relative value of the ground at the date of the placer application for placer and quartz purposes, and in answering such questions one or two witnesses stated that they had taken samples in two or three places, but not, however, from the surface of bed-rock (the place where placer gold would be looked for), and washed such samples but found no placer gold, the complainant preserving the proper objection. In view of the fact that such evidence was inadmissible and the further fact that the question as to the placer character of the ground has been conclusively determined by the issuance of patent, the complainant offered no testimony on the subject. With such flimsy testimony as a basis, counsel for the defendants in the oral argument in the trial court completely ignoring the fact that the certificate of placer location states there had been a discovery of clay as

well as placer gold, spent considerable time in an apparent effort to lead the court to the conclusion that the location of the ground as placer ground had been fraudulent and had been made with the design of getting from the government the title to ground in which it was expected that valuable leads would be afterward discovered if they were not then known to exist, notwithstanding the fact that if veins were then traceable on adjacent ground and into the Butte and Boston placer, that a discovery of them within the Butte and Boston placer could have been made and patent obtained for such lode claims by the payment to the government of an additional sum not exceeding \$12.50. The argument reaches the limit of absurdity. In order to defeat the title of the complainants, it is necessary to show veins known to exist, but if it were sufficient to show that such veins were merely supposed to exist within the Butte and Boston placer, the case of the defendants is equally weak.

The most important witness for the complainant is the judge who presided at the trial of this case, since he visited the ground and all of such openings after having heard the contentions of the different parties as to what was to be found there.

If veins had been discovered in the Butte and Boston placer on or prior to the date of placer application they could not answer to the designation of veins known to exist unless they were then definitely ascertained and of such value as to justify exploitation and

development. Defendants offered no testimony on the question of whether what they claim as veins in the openings referred to would have justified exploitation or development at the date of the placer application. Such questions as were propounded in any way relating to that question were asked in the present tense and called for a statement from the witness as whether or not such exploitation would have been justified at the time the question was asked. There was no attempt to show that the conditions at that time were the same as they had been twenty-one and one-half years previous when the placer application was made. It might be possible, of course, that in the meantime there had been such development of adjacent property or other change of conditions as to justify sinking on a vein or indications of a vein which would not have justified exploitation in the absence of such development. A suitable objection was made by complainant to all of such evidence and the attention of counsel for the defendants called to its insufficiency.

If it were assumed that veins with defined boundaries were shown in all of the openings referred to, and if it were further assumed that all of such veins were of sufficient value at the date of the placer application to justify exploitation and development, it could not be contended that such veins were then definitely ascertained beyond the openings made by the sinking of the prospect holes referred to. There was no development beyond the sinking of such shafts or pros-

pect holes. As a vein to be excepted from a placer patent must be definitely ascertained, it is evident that it is only to the extent that it is so ascertained that it is so excepted. If a vein is disclosed in one of such prospect holes such vein is definitely ascertained to the extent that it is so disclosed, but to no great extent. Its existence is known to the extent that it is exposed. Its existence beyond the place where it is so exposed rests upon mere conjecture. If the existence of veins were shown in all of the prospect holes referred to only so much of such veins as were so exposed could, under any circumstances, have been excepted from the placer patent.

SECOND.

We have so far considered the Butte and Boston placer as a whole but not separately the westerly two-thirds which is the part in controversy in this case. The Butte and Boston placer is represented on the map, Defendants' Exhibit No. 1, the boundaries being indicated by the line with a pink border. The portion of the Butte and Boston placer which is in controversy in this case is also indicated on such map, the corners being indicated by the letters, A, B, C, D, E, F, G, H. The prospect holes and openings claimed by the defendants to have been made on or prior to May 11, 1891, namely, Pleasant View discovery and Point Pleasant discovery, shafts 1, 2 and 9 and also the Hornet discovery are also indicated on this map.

The Point Pleasant discovery is indicated by the letter "A" above the figure 3016. With the exception of the Pleasant View discovery in which it is practically conceded that no vein was discovered, all of such prospect holes are outside of and some distance to the east of the ground in controversy. If the defendants had been able to show the discovery of veins in such prospect holes prior to the date of placer application, how could that affect the ground in controversy. Undoubtedly, it is the veins and the veins only (with a limited area of enclosing surface ground), which under any circumstances may be excepted from the placer patent. If veins had been discovered in such prospect holes but such veins did not enter the ground in controversy, how could it be said that the ground in controversy was affected by their discovery, and since the production of the placer patent together with proof of conveyance from the patentees to the complainant, as to the ground in controversy makes out a prima facie case for the complainant, as to such ground, in the absence of proof that any such veins assumed to have been discovered in fact extend into the ground in controversy, the case must be considered as though they do not in fact so extend. Indeed proof merely that such veins did extend into such ground would not be sufficient without proof of their situation within such ground, since it is only the veins with a definite area of enclosing surface ground which may be excepted.

Viewing the case from the date of the placer application it will be readily conceded that there was not then a discovery of any vein within the ground in controversy.

THIRD.

The defendants do contend, however, that by development work done within the year preceding the taking of the testimony in 1911, two veins which they designate as the north vein and the south vein had been traced as far westerly, respectively, as shafts 21 and 19, both of which are on the extreme eastern border of the ground in controversy, and we understand their contention to be also that such veins continue in a westerly direction and through the ground in controversy, though they have not undertaken to supply any evidence of the courses followed by such veins westerly from such shafts, or indeed to furnish anything which may be considered as evidence of the continuance of such supposed veins or either of them west of such shafts.

The contention of the complainant is that they have not traced any veins westerly as far as either of such shafts; that there is a north and south fault in fact shown in each of such shafts but nothing else, and that the existence of any vein within the ground in controversy has not been shown at all. We have heretofore referred to the vein shown in tunnel 34, the Mullins tunnel, as the Mullins vein. Defendants, as we have

already stated give such vein a much greater width than given to it by the complainant's witnesses, defendants' claim being that it is shown in the Hornet shaft. Defendants have referred to such vein as the south vein. Some of the defendants' witnesses have claimed that its course can be projected in a westerly direction through tunnels 35 and 36 and into shaft 19. Most of the witnesses for the defendants do not claim that there is in fact any vein shown in tunnel 35 or 36. Except for such tunnels there is no exploration of bed-rock between shaft 19 and tunnel 34, and such opinions as were given as to the Mullins vein being shown in such tunnels or in shaft 19, is evidently pure conjecture based mainly on an attempted projection in a westerly course of the vein on the strike which it is shown to have in tunnel 34. Complainant's witnesses have pointed out that if such vein continued on such strike in a westerly direction, it would not be encountered in any of such workings. As there is a decided slope of bed-rock to the west and the vein is south dipping, the apex of the vein as exposed on bed-rock would have a decided southwesterly trend though the strike of the vein on a horizontal plane be nearly east and west. The uncertainty, of course, is greatly increased on account of the known existence of at least one north and south fault between tunnel 34 and shaft 19 which would have the effect of cutting and dislocating such vein where it intersected it, but the extent of such throw is an unknown quantity. The occurrence in shaft 19 has no

resemblance to that portion of the Mullins vein exposed in tunnel 34. If a vein were in fact exposed in the bed-rock in shaft 19 there is no proof of its being the same vein as is shown in the Mullins tunnel.

At the time of the commencement of the testimony there was an exposure of a small amount of ore in the north cross-cut from tunnel 31. Such cross-cut having been driven and such exposure made within the last few years, and many years after the date of the placer application. During the time of the taking of testimony and after Mr. Winchell's testimony was given such cross-cut was extended further north and a considerable body of ore exposed. For the purpose of the argument the complainant concedes the existence of an east and west vein there with a strike as indicated on complainant's exhibit No. 17. The defendants claim that the same vein is exposed in the north cross-cut from shaft 9, also in shafts 1, 2 and 21, although anything exposed in such shafts bears no resemblance to anything exposed in the north cross-cut from tunnel 31. As the vein in the north cross-cut from tunnel 31 has such a strike that it could not possibly be encountered in any such shafts if it continued on the same strike they undertake to account for the irregular course which it must follow to reach all such openings by assuming the existence of north and south faults between such points and such successive dislocations of the vein as to cause different portions of it to be exposed in each of such openings, and in order to make

their theory fit the facts they have to assume that at one place the throw of the vein going to the west is to the north, and at another place the throw of the same vein and by the same kind of faulting is toward the south. It can only be said concerning such testimony that it is not only guess work but very poor guessing.

Many years after the date of the placer application, there was certain development in what is known as Mineral application No. 888, a patented placer claim which immediately joins the Butte and Boston placer on the west. In doing such development a number of veins were explored, one of which known as the Donner vein, was explored for a distance of about three thousand feet along its strike and to a depth of about 1200 feet below the surface which in most parts of the vein is at a depth of about six hundred feet below the surface of bed-rock. Such vein is indicated on the map, Defendants' Exhibit No. 115, and though the vein is considered as remarkable for its regular strike it will be seen by looking at such map that its strike varies greatly. If projected on its average strike toward the east, it is conceded that it would not be encountered in either shafts 9, 2, 1 or 21, or in tunnel 31, or in any of the connected workings. As it is a north dipping vein no identity is claimed between it, of course, and the Mullins vein. The most easterly development on this vein at the time of the taking of the testimony, was distant about

four hundred and fifty feet from the west boundary line of the Butte and Boston placer.

Referring to the effect of faulting Mr. Barker testified concerning the continental fault, the main fracture of which runs in a north and south direction, a short distance east of the Hornet shaft, to the effect that such continental fault had been explored from Park Canyon on the north, to a point probably two thousand feet south of the Butte and Boston placer, that is a total length of about a mile. This fault has dislocated all east and west veins throughout its course. He has never been able to determine the amount of such dislocation (T. 742). To the west of the continental fault there are certain parallel fissures. It is impossible to say just how many because there is no continuous working from the continental fault to the west for any great distance (T. 743; 814). On cross-examination this witness conceded the existence of such north and south fault at the point where shaft 21 is and where complainant contends that there is such fault exposed and not an east and west vein. He testified as follows: "These same agencies that produced the fault, this continental fault which runs east of the Hornet shaft probably produced the condition which I have explained between tunnel 30 and the Pitts-mont shaft. Between tunnel 30 and shaft 21 there is very great difference in the elevation of bed-rock. In a horizontal distance of about 150 feet

there is a vertical depression of about one hundred feet. That would be very steep indeed about a cliff. That is the difference in elevation such as would be brought about by a north and south fault. I think that faulting has had to do with the subsidence of the ground there" (T. 745). Speaking of the ground lying west of shaft 21, this witness testified on direct examination as follows: "Going into the Pittsmont ground there must be another drop because in the Pittsmont shaft it was over 600 feet to bed-rock" (T. 743-744). Referring to the occurrences in shaft 9, the Rabbit, the Vesuvius discovery, tunnel 31, shafts 1 and 2, tunnel 30 and shaft 21 the witness said that he thought they were the same vein, but by faulting subsequent to the formation of the vein they had been dislocated so that the continuity of such vein had been destroyed. He also said that there was nothing which would enable him to tell the extent of such dislocation, that the direction of the throw is a matter of conjecture, and that there is nothing in the nature of drag shown upon the ground which would prove which way the throw has been (T. 788). Beginning at shaft 21 and going in an easterly direction the different occurrences claimed by Mr. Barker to be a part of the same vein are described by him as follows: In shaft 21 there are no walls of a vein shown and he claims nothing to indicate the strike except the occurrence of certain strata in the bottom of the shaft. In the south cross-cut from tunnel 30, one

hundred and fifty feet to the northeast he says a few inches of quartz is encountered having an east and west strike, and about two hundred feet easterly from there in shaft 1 he says a vein is found having an east and west strike and about five or six inches in width. About one hundred feet then in a southeasterly direction a vein is encountered in the north cross-cut from tunnel 31 having a width of about fifteen feet, and about twenty-five feet in a northeasterly direction from there other vein material is encountered in tunnel 31, and a few inches of mineralization is found in the Rabbit discovery about twenty-five feet east, and a small vein in the north cross-cut from shaft 9 about twenty-five feet east of the Rabbit discovery. The only reason given by this witness for assuming that what is referred to as disconnected portions of one vein were at one time a continuous vein, is that he says that they are all alike in one respect, that is they have a northerly dip, except in shaft 21, and he assumes a northerly dip there. It appears, however, from the testimony of Mr. Williams for the defendants, that all of the veins explored in the eastern portion of Mineral application No. 888 dip to the north (T. 899) and from the testimony of Mr. Ray that south of the Donner vein is a north dipping vein which has a southwesterly and northeasterly strike and which if it extends on its strike sufficiently far in a northeasterly direction will cut the Donner vein and dislocate it (T. 949).

As to the so-called southerly vein, the chief witness for the defendants, Mr. Barker, made no claim that it could be traced in a westerly direction beyond its actual exploration in the Mullins tunnel (T. 958-959). The defendant, Mason, himself testified that the Mullins vein could not be traced west of the place where it was actually uncovered. Mr. Barker, as well as Messrs. Watson and Gage testified as to the absence of any vein in either tunnel 35 or 36.

All of the witnesses for the complainant testified positively as to the absence of any vein showing in tunnels 35 and 36 and shaft 19, and further that there was no possibility of determining the course of the vein shown in the north cross-cut from tunnel 31 beyond the distance where it is actually exposed or to determine its position if it exists at any point outside of the place where it is exposed by underground development, and that the same is also true of the vein exposed in the Mullins tunnel. Complainant's testimony is to the effect that what occurs in shafts 19 and 21 is a north and south fault. Whether one fault runs through both shafts or a different fault is exposed in each shaft, the witnesses ventured no opinion.

Defendants produced a sample (Defendants' Exhibit No. 96), taken from shaft 21. Complainant's witness, Wilson, pointed out the presence in such sample of rounded particles showing conclusively that it is fault material (T. 1152). Mr. Wilson having described shaft 19, testified concerning the material in

the bottom of the shaft as follows: "Crushed granite accompanying the fault movement was found in the bottom of that shaft in bed-rock. That is a plane of the continental fault. The material was clay, kaolin, resulting from the disintegration of the feldspar in the crushed granite and the various movement planes had about a north and south course and certain ones of those planes showed a considerable interior movement accompanied with slickensides along the clay material" (T. 1105).

Concerning the continental fault and the parallel fractures to the west of it this witness said: "There has been a great movement that had a width of probably two thousand feet and which had dropped this entire region an unknown distance from the top of the main range to the east of the camp" (T. 1105). Concerning shaft 21 this witness said: "That shaft has penetrated bed-rock after going through the wash to a possible depth of two or three feet and the west side of that shaft is a crushed granite clayey mass somewhat kaolinized. On the east side it was also a crushed granite which had apparent directions of running north and south with a dip of seventy-five to eighty degrees to the east and being undoubtedly in my opinion a plating of the continental fault" (T. 1117).

To the same effect is the testimony of Mr. Warner, Mr. Fisher, Mr. Linforth and Mr. Berrien.

Considering all of the development work prosecuted

on the Butte and Boston placer up to the time of the taking of the testimony and considering all of the statements of defendants' witnesses as true and interpreting them most favorably to the defendants, still no vein is shown within the ground in controversy in this case, west of shafts 21 and 19, and there is no proof, which may be considered as such indicating that if veins exist in those shafts, that they are veins or that either one of them is a vein which had been discovered on or prior to the date of the placer application. Giving consideration to all of the evidence, it is perfectly clear we submit that no vein has been shown to exist in either shafts 21 or 19 and that the existence of no vein has been shown within the ground in controversy.

FOURTH.

It already sufficiently appears from what has been heretofore said that there could be no description of the vein or veins supposed by the defendants to exist within the ground in controversy, for the reason that if they do exist there, it is not claimed that they know their position outside of shafts 21 and 19, and as to those shafts it is not claimed that a wall or any walls was exposed, so that if veins exist there, their position has not been definitely determined. There was no witness produced by the defendants who undertook to state the strike or position of any vein west of either shafts 21 or 19. Certain pencil lines were drawn on the map (Defendants' Exhibit No. 1), at the request of the

counsel for the defendants, but according to the testimony of Mr. Barker, who drew them, so far as he knew they meant nothing, but were simply drawn because counsel for the defendants requested it. Referring to such map it will be seen that the pencil line Y-V is roughly drawn so as to pass through shaft 21, and so also are the lines X-21 and Z-21. The line S-T is run near, or passes through the Gulf discovery shaft and shaft 19. There is not a word in the testimony indicating that any such lines had any significance whatever. Such testimony as relates to them is found on pages 951 to 959. The testimony concerning line X-21 and Z-21 is as follows: "Q. I wish that you would project a line upon this map of ours, Defendants' Exhibit 1, from shaft No. 21 to this red marking upon the map. A. That is the red marking on the west boundary of the Butte and Boston placer? Q. Yes, sir—run a line. A. (Witness draws line on map). Q. And for the accommodation of the other side, I wish you would likewise run a line from that point to this pencil mark 'C-1'. A. (Witness draws line on map)." (T. 951-952.)

Concerning the line S-T, the same witness testified as follows: "Q. When you speak of the line S-T, denoting the strike of the vein in answer to a question, you did not mean to so testify did you? A. I did not say anything about it being the strike of the vein. I was asked to project a line from the shaft 19 through the Hornet discovery; I did, and I marked it S-T." (Tr. 958.)

The two points marked "C" on the line representing the western boundary of the Butte and Boston placer were placed there by the witness Williams, and were intended to indicate his idea of the place where the Donner vein represented on the map, Defendants' Exhibit No. 115, would intersect the west boundary line of the Butte and Boston placer on the surface of the ground assuming that its strike was due east from the most easterly point where it was exposed by underground development and for a sufficient distance to intersect that line (T. 895; 904-906). Since the vein was not developed above the 660-foot level (that being the depth of bed-rock below the surface of the ground at that place and the highest point where the vein existed), it was necessary to project a line on the dip of the vein to the surface and to indicate the position of the vein on the surface and the correctness of such indicated position would, of course, depend upon the correctness of such projection and the correctness of the assumed dip of the vein below the 660-foot level, and that the portion of the vein which had once existed above the 660-foot level had the same dip as that portion of it which has been developed below that level. Two points are marked with the letter "C" on account of two different dips having been assumed for that portion of the vein above the 660-foot level.

One of the arguments of the defendants is that, having the strike of a vein for any distance, its strike is

presumed to continue the same for an indefinite distance beyond the place where the strike has been actually ascertained. In projecting the Donner vein they have said that the strike is east and west, and in undertaking to project the vein on its course beyond the place where it is exposed, have adopted that direction as the strike, but projecting the vein on such strike, they find that its apex on the Butte and Boston placer would extend several hundred feet south of shaft 21, which is the shaft with which they are endeavoring to connect it.

Another argument made by the defendants is that the line Y-21 represents the strike of the so-called northerly vein and projecting it westerly they get the line Y-V. The line so projected westerly, however, is about one thousand feet north of the Donner vein and their efforts in that way to connect with that vein fail. Enough has been said to show that all of the guessing which has been done by the defendants' witnesses as to the supposed course of either of such veins within the ground in controversy and such guessing as has been done by defendants' counsel and by him attributed to their witnesses, cannot be properly classed as evidence if that term is stretched to its greatest possible limits. If speculation were permitted instead of proof, sufficient data has not been supplied upon which a decree in favor of the defendants could be drawn.

When the counsel for the defendants (using the

witness Barker, to carry out his direction), drew the line V-Y and X-21 he failed to take into account either the difference of elevation of the ground or difference in the elevation of bed-rock between the point indicated as the easterly and westerly ends, respectively, of such lines. To illustrate by reference to Defendants' Exhibit No. 115, by descending from the eight hundred foot level to the 1300-foot level for a vertical distance of five hundred feet, the horizontal distance gained to the north is 220 feet, in other words a vertical line drawn through the vein at the 1300-foot would be 220 feet north of a vertical line drawn through the same vein at the eight hundred foot. If the vein were projected on its dip from the eight hundred foot level to the surface of the ground and a vertical line drawn through the projected course of such vein at the surface, such vertical line would be, of course, several hundred feet south of such vertical line drawn through the vein at the eight hundred foot level, and if the vein were projected upward on its dip so as to intersect a horizontal plane drawn through shaft 21 at the surface of bed-rock and a vertical line drawn through the vein where it intersected such plane, such line would be a still greater distance south. If counsel for the defendants is to be permitted to guess at the course of the vein as projected on its strike, it is evident that his guess must be incorrect, since he altogether failed to take into account the dif-

ference of elevation of bed-rock at shaft 21 and the most easterly development on the Donner vein.

The comment of the judge who tried the case as to the lack of testimony on this point on the part of the defendants is as follows:

“Complying with a suggestion made during the course of the oral argument that the defendants furnish descriptions of the vein sufficiently definite to be incorporated into and give effect to a decree, descriptions together with diagrams illustrating the same have been furnished, but upon inspection they appear to be largely, if not wholly, arbitrary. It is, of course, a simple matter to prepare a description of a strip fifty feet in width extending across plaintiff’s ground; from a point on the east to a point on the west, but what was desired was a description based upon and tied to the evidence. No references are made to the sources in the record from which these descriptions are derived, and I have been able to discover none. Upon the other hand, a reading of the evidence, in the light of the personal inspection of the premises made in company with and under and guidance of representatives of the litigants, confirms the plaintiff’s contention that there is no substantial or rational basis upon which to rest such a description” (T. 43-44).

FIFTH.

We have already made reference to the absence of any proof showing a discovery of a vein in either the alleged Pleasant View or Point Pleasant locations, and we have also shown that there was no discovery of any vein within the Butte and Boston placer at any time prior to the date of the placer application. Lacking evidence of the discovery of a vein, there is, of course, no proof of either the making of the Point Pleasant or Pleasant View locations. If the existence of such discoveries were assumed the evidence is, however, in a number of other respects insufficient. There was no proof that the corners were sufficiently marked by monuments, except by hearsay testimony. As to the Point Pleasant claim there is no attempt by competent proof to show its position on the ground. A proper objection was made to such incompetent proof as was offered. The production of the certified copy of the recorded declaratory statement of such locations is only evidence of the fact of the record of such statement and such facts as by law are required to be stated in it, which are the names of the locators, the date of the location and such a description of the claim by reference to natural objects or permanent monuments as will identify it. It was necessary, in addition, to show with reference to each of such claims the discovery of a vein within their boundaries and that the location was definitely marked on the ground so that the boundaries could be readily traced.

The witness Barker, in explaining the map (Defendants' Exhibit No. 1), stated that the boundaries of the Point Pleasant claim were not put on the map from any survey made by any witness who testified, but that such boundaries were taken from a map that was introduced in evidence in some case in the District Court (T. 63). The witness also said that such surveys as were made and represented on the map were made by Mr. Pennington and that Mr. Pennington's survey did not include the boundaries of the Point Pleasant claim (T. 63). The boundaries of Point Pleasant claim, as represented on the map, appear to have been based on a survey made by T. T. Baker, who did not testify. Mr. Pennington, himself, testified that he knew nothing concerning the corners of the Point Pleasant claim, and it further appeared that all of the corners of the claim, the location of which were represented on the map, were based upon statements made to him by other persons, which other persons were not called as witnesses (T. 66), or if called, could not testify as to such matters from their own knowledge. Some of the corners of the claims represented on the map could be identified at the time he made the survey, but he could not tell at the time he gave his testimony which corners could be so identified (T. 63). There was no testimony offered by any witness, who claimed to know of his own knowledge, the position of any of the corners or of the discoveries. Mr. Mason's statement is as follows: "Mr. Pass-

more took me to the corners and showed me where they were. He is the man that put the corners up. That was the source of my opinion."

Complainant's Exhibit No. 14 has represented on it what purports to be the boundaries of the Pleasant View claim. Mr. Berrien, who prepared the map, testified that he knew nothing concerning such boundaries and he did not undertake to testify that they were correctly represented on such map (T. 1441).

But if a valid location of the Point Pleasant and Pleasant View claims had been shown by competent proof, it is quite clear from the testimony that they were abandoned prior to the date of the issuance of patent. Mr. Mason testified that there was certain litigation, that such litigation was settled by a compromise and that by such settlement and compromise the witness and his partners received ten acres of the upper portion of the ground known as the Butte and Boston placer (T. 1074-1075). 1895 or 1896 was fixed as the date of such settlement (T. 1099). In another place the witness stated that the adverse suit had been disposed of by compromise in 1895. Mr. Mullins states that the litigation which was compromised was the suit to determine the right of possession brought against the placer applicants by the quartz claimants, who had adversed such application (T. 475). Such compromise was prior to the issuance of the placer patent, for as stated in another place, it was by virtue of such compromise that judg-

ment was rendered in favor of the defendants, the placer applicants, who thereupon proceeded to patent.

It is clear from the testimony that there is no proof of any valid location of either the Point Pleasant or Pleasant View claims or definitely what territory was embraced within such claims. It does affirmatively appear, however, that such attempted locations were abandoned prior to the date of the issuance of the placer patent.

In the foregoing discussion of the evidence no reference has been made to the so-called surrebuttal testimony (T. 1594-1671), or to the testimony of complainant in reply (T. 1673-1689), such so-called surrebuttal testimony having been taken after the time allowed for the taking of testimony had expired, and no order having been made allowing the taking of such testimony, complainant objected to its introduction and at the conclusion of the same, moved to strike it out (T. 1671-1673), and the complainant offered testimony in reply only in the event of such motion being overruled. Should such testimony be considered, it will be sufficient to say concerning it, that so far as it is material, it tends to sustain the various contentions of the complainant.

The Law.

The appellee relies upon the following legal propositions:

I. A PLACER PATENT CONVEYS TO THE PATENTEE EVERYTHING WITHIN VERTICAL PLANES DRAWN DOWNWARD THROUGH THE SURFACE BOUNDARIES, EXCEPT (a) VEINS, THE TOPS OR APICES OF WHICH ARE WITHIN THE PLACER LIMITS AND WHICH WERE KNOWN TO EXIST AT OR PRIOR TO THE DATE OF THE APPLICATION FOR PLACER PATENT AND WERE NOT INCLUDED IN SUCH APPLICATION, AND (b) SUCH SEGMENTS OF VEINS, THE TOPS OR APICES OF WHICH ARE OUTSIDE OF THE PLACER SURFACE BOUNDARIES BUT WHICH UNDERLIE THE PLACER SURFACE.

II. THE EXTENT OF THE SURFACE AREA WHICH MAY BE EMBRACED IN A LODE CLAIM WITHIN GROUND PATENTED AS PLACER GROUND DOES NOT EXCEED 25 FEET ON EACH SIDE OF THE VEIN.

III. IF GROUND EMBRACED WITHIN A PLACER APPLICATION FOR A PATENT BE COVERED EITHER WHOLLY OR PARTLY BY A QUARTZ LODE LOCATION MADE PRIOR TO THE PLACER LOCATION, AND THE LODE

CLAIMANT FAILS TO ADVERSE THE PLACER APPLICATION, AND SUCH LODE CLAIM BE VALID AND EXISTING AT THE DATE OF THE ISSUANCE OF PLACER PATENT, THE GREATEST EXTENT OF SURFACE GROUND AS TO WHICH THE PLACER PATENT MAY BE HELD TO BE INVALID BY REASON OF SUCH PRIOR LODE LOCATION DOES NOT EXCEED 25 FEET ON EACH SIDE OF THE VEIN LOCATED AND COVERED BY SUCH LODE LOCATION.

IV. THE PLACER PATENT IS PRIMA FACIA EVIDENCE OF TITLE IN THE PLACER PATENTEE, NOT ONLY OF THE SURFACE GROUND INCLUDED THEREIN, BUT ALSO OF ALL ORES AND MINERALS WHICH LAY BENEATH SUCH SURFACE, AND THE BURDEN IS UPON ANY ONE CLAIMING THAT A VEIN OR LODE WAS BY VIRTUE OF ITS BEING KNOWN TO EXIST AT OR PRIOR TO THE DATE OF PLACER APPLICATION AND ON THAT ACCOUNT EXCEPTED FROM THE PLACER PATENT TO SHOW THAT SUCH VEIN WAS IN FACT KNOWN TO EXIST.

V. IN ORDER TO PROVE THAT A VEIN WAS KNOWN TO EXIST WITHIN THE MEANING OF THE TERM AS USED IN SECTION 2333 OF THE REVISED STATUTES OF THE UNITED STATES, IT IS NECESSARY TO PROVE,

FIRST, THAT WHAT WAS CLAIMED AS A VEIN HAD DEFINITE BOUNDARIES AND THAT SUCH VEIN WAS AT THE DATE OF SUCH PLACER APPLICATION FOR PATENT DEFINITELY ASCERTAINED; SECOND, THAT SUCH VEIN WAS UNDER CONDITIONS THEN EXISTING OF SUFFICIENT VALUE TO JUSTIFY EXPLOITATION AND DEVELOPMENT FOR THE PURPOSE OF EXTRACTING MINERAL TO BE FOUND IN IT.

VI. THE BURDEN IS ALSO UPON ANY ONE MAKING A CLAIM TO GROUND BY VIRTUE OF A LODGE LOCATION UPON A VEIN CLAIMED TO HAVE BEEN SO EXCEPTED FROM A PLACER PATENT TO FURNISH A DESCRIPTION OF THE VEIN AND OF THE AREA OF ENCLOSING SURFACE GROUND SUFFICIENT TO PERMIT THE DRAWING OF A DECREE IN HIS FAVOR, AND THE BURDEN IS ALSO UPON ANY ONE ATTEMPTING TO SHOW THE INVALIDITY EITHER WHOLLY OR PARTLY OF A PLACER PATENT BY REASON OF A PRIOR LODGE LOCATION WHICH WAS VALID AND EXISTING AT THE DATE OF THE PLACER PATENT TO NOT ONLY SHOW THE FACT OF THE MAKING OF SUCH PRIOR QUARTZ LODGE LOCATION BUT THAT THE SAME WAS VALID AND EXISTING AT THE DATE OF SUCH PLACER PATENT AND TO

FURNISH ALSO A DESCRIPTION OF THE AREA AS TO WHICH THE INVALIDITY OF THE PATENT EXTENDS, WHICH IN A CASE WHERE THERE HAS BEEN NO ADVERSE OF THE PLACER APPLICATION DOES NOT EXCEED THE VEIN COVERED BY SUCH PRIOR LODE LOCATION AND 25 FEET ON EACH SIDE.

VII. IN ALL SUCH CASES THE BURDEN OF PROOF MAY NOT BE DISCHARGED BY SLIGHT EVIDENCE BUT CLEAR AND CONVINCING PROOF IS REQUIRED.

VIII. THE PRODUCTION OF A RECORDED CERTIFICATE OF LOCATION OF A LODE CLAIM IS ONLY EVIDENCE OF THAT WHICH BY LAW IS REQUIRED TO BE STATED IN SUCH CERTIFICATE OF LOCATION, WHICH UNDER THE LAWS IN FORCE IN MONTANA ON APRIL 1st, 1890, ARE THE FACT OF THE RECORDING OF SUCH CERTIFICATE, THE NAMES OF THE LOCATORS, THE DATE OF THE LOCATION AND SUCH A DESCRIPTION OF THE CLAIM BY REFERENCE TO SOME NATURAL OBJECT OR PERMANENT MONUMENT AS WILL IDENTIFY IT.

IX. IN ORDER TO SHOW A VALID LOCATION IT IS NECESSARY TO PROVE IN ADDITION TO THE FACTS ENUMERATED IN THE PREVIOUS PARAGRAPH, FIRST, THAT THERE

WAS A VALID DISCOVERY, AND SECOND, THAT THE LOCATION WAS DISTINCTLY MARKED ON THE GROUND BY MONUMENTS SO THAT ITS BOUNDARIES COULD BE READILY TRACED.

X. ABANDONMENT OF A LODE LOCATION MAY BE INFERRED FROM ACTS INCONSISTENT WITH AN INTENTION TO RETAIN THE CLAIM.

XI. UNDER THE LAWS IN FORCE AT THE TIME OF THE HEARING OF THIS CASE AND AT THE TIME OF THE TAKING OF THE TESTIMONY IN IT, TESTIMONY TAKEN AFTER THE EXPIRATION OF THE TIME ALLOWED BY LAW FOR THE TAKING OF THE TESTIMONY SHOULD NOT UNLESS SUCH TIME HAS BEEN EXTENDED BY THE COURT BE RECEIVED OR CONSIDERED.

XII. THE ISSUANCE OF A PLACER PATENT CONCLUSIVELY DETERMINES THAT THE GROUND COVERED BY SUCH PATENT IS IN FACT PLACER GROUND.

XIII. IN A CASE LIKE THE ONE AT BAR, EVIDENCE TO THE EFFECT THAT THE GROUND IN CONTROVERSY DID NOT CONTAIN PLACER GOLD OR HAD NEVER BEEN WORKED AS PLACER GROUND IS INADMISSIBLE.

XIV. A VEIN CAN ONLY BE SAID TO BE

KNOWN TO EXIST WHERE IT IS ACTUALLY EXPLORED. IF EXPLORED FOR A CERTAIN DISTANCE THERE IS NO PRESUMPTION THAT IT CONTINUES BEYOND THE PLACE OF SUCH ACTUAL EXPLORATION.

1.

The character of the title acquired by a placer patentee is to be determined by the provisions of Sec. 2333 of the Revised Statutes of the United States, which are as follows:

“Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not in-

clude an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The express language of the statute is that where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within its boundaries. Concerning this point Mr. Lindley in the valuable second edition of his works on mines, Section 781, says:

"We may conclude, that a placer patent conveys to the patentee everything within vertical planes drawn downward through the surface boundaries, except (1) such lodes, or veins, whose tops or apices, are within the placer limits, whose existence was known prior to the filing of the application for placer patent, and were not included in the placer application; (2) such segments of veins having their tops, or apices, elsewhere, as may underlie the placer surface and which may lawfully be taken by the apex lode locator under a regular valid lode location, pursuing his vein on its downward course."

See also *Sullivan v. Mining Co.*, 143 U. S. 431.

II.

By referring again to Sec. 2333 R. S. U. S. it will be seen first, that it is only by virtue of the known existence of a vein or lode within the ground covered by the placer application that anything is reserved or excepted; and second, that which under any circumstances is reserved or excepted is the vein or lode claim.

The placer applicant may include in his application an application for patent also upon the vein or lode claim. If he follows that course the extent of surface area which may be included within such vein or lode claim does not exceed 25 feet on each side of the vein or lode claimed. If we suppose the existence of a known lode definitely ascertained wholly within a placer claim, the applicant for patent might expressly exclude such area of surface ground in his application for patent. If he did so, it could hardly be contended that some other person might in a lode location upon such known vein embrace a greater area than that which was expressly excepted. If the applicant for patent does not expressly except the lode or vein with such area of enclosing surface ground, it cannot, we submit, be held that a greater area is reserved than that which would have been reserved by such express exception or than that which could have been embraced in such lode claim within the placer ground if an application had been made for patent upon such lode claim, and of course, it is only

that which is reserved and excepted from the placer patent by failure to include in such application an application for the vein or lode which is reserved, the title as to which remains in the government and which may be afterward located as a lode claim.

So far as we know the question has not been passed on by the Supreme Court of the United States or any of the Circuit Courts of Appeal. The ruling of the Land Office and the decisions of the State courts are all in harmony however.

Upon this point the Supreme Court of Colorado in

Mt. Rosa Mining, Milling & Land Co. v. Palmer, 26 Colo. 56; 56 Pac. 176

after analyzing the provisions of Sec. 2333 said:

"We think it is manifest that the lode or vein referred to in the first and third provisions is the same thing, and that whatever a placer claimant would acquire by availing himself of the privilege accorded him by the first provision of the section, is reserved by virtue of the third provision; in other words, that the same extent of surface ground that is incident to such lode or vein, if located and patented by the placer claimant, is reserved from the placer patent in case of his failure to claim and patent the same. If he elects to patent the lode, he is required to take twenty-five feet on each side of the center of the vein, and pay therefor at the rate of five dollars per acre. This is a privilege accorded to him, which he may avail himself of, or not, as he sees fit. If he elects to

waive this privilege, he may do so in one of two ways—either by expressly excepting the lode from his placer location and application for patent, or remaining silent in regard to it. If silent, then by implication he declares that he makes no claim to such lode and by such silence is bound to the same extent, and in the same manner, but no further, that he would have been by an express declaration. By electing to make no claim to a known lode, or express declaration in regard to it, he must be understood as claiming for placer purposes, the greatest possible area within the boundaries of his placer claim, and should be held to have relinquished only that which he might have taken, which is the lode, with the amount of surface ground provided.”

In the case of

Noyes v. Clifford, 94 Pac. 842,

counsel for both plaintiff and defendant assumed that the extent of surface ground which could be located as a lode location within ground patented as placer was twenty-five feet on each side of the middle or center of the vein. With reference to this point the Supreme Court of Montana in the course of the opinion said:

“If the lode or vein was excepted by the terms of the patent, it, together with twenty-five feet on either side of it was open to exploitation and location by any citizen of the United States.”

In

Washoe Copper Co. v. Junilla, 115 Pac. 917
the same assumption as to the law was made by counsel for the respective parties. In that case the Supreme Court of Montana in passing upon the admissibility in evidence of a certified copy of the declaratory statement of location of the Morning Star claim which had been offered as a declaration against interest, said that such declaratory statement should have been excluded because it appeared that the locator, one Charles Colbert, had parted with his interest in the placer title before the making of the lode location and that the effect of the admission of such declaratory statement would be to admit the declaration on the part of Colbert to the effect that the placer title which he had sold and conveyed was imperfect to the extent of the surface area which could be embraced in a lode claim within the limits of such placer claim, which the court states is twenty-five feet on each side of the vein. Upon this point the language of the court was:

“The effect of this declaration, if true, is to prove that the extent of his placer claim is less than it purports to be; and, having conveyed away all that his placer purports to have been, the direct effect of this declaration is to destroy the title to that portion of the placer crossed by the vein, and a strip of 25 feet on either side thereof.”

The United States Circuit Court for the District of Montana (Judge Hunt presiding) in the case of

South Butte Mining Co. v. Butte & Veronica
Copper Mining Co.

decided to the same effect, a certified copy of a portion of the opinion on rehearing being annexed hereto.

A ruling has been made by the Secretary of Interior to the effect that the extent of surface ground which may be located by a lode claimant within ground patented as placer is twenty-five feet on each side of the middle or center of the vein and such rule has been in force in the Land Department for a number of years.

In

1 Lindley on Mines, (second edition) 756,

the learned author after referring to such ruling by the Secretary of Interior and decision of the Supreme Court of Colorado says:

“With this consensus of opinion by the courts and the Land Department the rule may be considered as practically settled.”

The same rule is stated in

27 Cyc. 616.

III.

Contention is made by the appellants that the patent for the Butte and Boston placer is invalid to the extent of the whole area in conflict between such placer and the so-called Point Pleasant and Pleasant View Lode locations. This contention is entirely aside from the contention made by the appellants as to veins known to exist at the date of the placer application.

R. S. U. S., Sec. 2325
after stating in detail the steps prior to the completion of publication necessary to be taken in order to procure patent for land claimed and located for valuable deposits continues as follows:

“At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.”

R. S. U. S., Sec. 2329
is as follows:

“Claims usually called ‘placers,’ including all forms of deposit, excepting veins of

quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

For the sake of argument we will, for the present, assume that there is competent proof of the location of such lode claims and that they were valid and existing claims at the date of the issuance of such patent, and that there is competent proof on the part of the appellants showing definitely what area was so in conflict.

Proceeding with these assumptions in mind, the appellants are confronted with the provisions of said Sections 2325 and 2329. According to the evidence in the case the application of Simeon V. Kemper and Josephine Lorenz was adversed by Louis Mason and others who claimed to be the owners of the so-called Point Pleasant and Pleasant View locations and who claimed a superior right to the ground on account of priority of location. If their locations were in fact prior that was a sufficient ground upon which to file such an adverse claim, and in fact the only way that such rights as they may have had by reason of priority of location could be preserved. Admitting for the sake of argument that such locations were in fact prior and keeping in mind that we have already assumed

that they were valid and existing at the date of the issuance of patent, the appellants are undoubtedly right in their contention that the land embraced in such lode locations was withdrawn from entry and was not subject to disposal or sale by the government, and that the patent issued to the placer applicants was invalid insofar as it embraced land which was at the time covered by such lode locations, unless for some reason the rights of the lode claims are barred, but according to the evidence, the lode claimants had in fact filed an adverse claim to the placer application and then had filed two suits to determine the right of possession as to the areas in conflict, and such suits by reason of an agreement, proceeded to judgment in favor of the placer applicants, who thereupon procured a patent, and then in order to carry out such agreement deeded to the lode claimants one-third of the ground embraced in such placer application. Under such circumstances, if the appellant Mason had continued to represent every year the Point Pleasant and Pleasant View claims, would he be allowed to assert any claim to any part of the land embraced in such placer application by reason of such lode locations, or would the court say that the effect of the agreement by which he allowed judgment to be taken against him in the adverse suits was to withdraw the adverse claim or adverse claims which he had filed to the placer application and that he was then in the same position that he would have been if he had filed no adverse, and that an in-

disputable presumption had arisen that no conflicting claims existed to the premises described in the placer application? If, under the circumstances assumed such claims on the part of the appellant Mason would be held to be barred, are the other appellants in any better position? We have assumed for the sake of argument that the appellant Mason is able to connect himself with the title which was held under such lode locations. The other appellants do not attempt to connect themselves in any way with such title. Are they in any more favorable position and would they be allowed to say (in a collateral attack upon the patent, which this is), on that account that the patent so far as it covered such area in conflict was invalid? It is the appellee's contention that whatever rights the lode claimants may have had by reason of priority of location were lost by the withdrawal of the adverse claims and the issuance of patent in favor of the placer claimants and that no third party will be heard to say that the placer patent was invalid on account of any supposed prior lode locations. We say that that is the necessary effect of the provisions of said Section 2326.

The case of

Lavagino v. Uhlig, 198 U. S. 443

was an action to quiet title to conflicting lode locations. The parties on one side asserted title by virtue of the Levi P. lode location and the parties on the other side asserted title by virtue of the Uhlig No. 1 and the

Uhlig No. 2 lode locations. The decision of the case turned upon the construction to be given to the provisions quoted from Sec. 2326. In passing upon this point Mr. Chief Justice White (then Mr. Justice White) said:

“This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice, and performed the other acts made necessary to entitle him to a patent, and who makes application for a patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section, thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought, he may abandon such rights and cause them in effect to inure to the benefit of the applicant for a patent by failure to adverse, or, after adversing, by failure to prosecute such adverse.

“It cannot be denied that under Sec. 2326, if, before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adverse the application, upon an establishment of a prima facie right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. *Gwillim v. Donnellan*, 115 U. S. 45, 51, 29 L. Ed. 348, 350, 5 Sup. Ct. Rep. 1110. And the same result would have arisen had the owner of the

Levi P. adverse the application for a patent based upon the Uhlig locations, and failed to prosecute, and waived such adverse claim.

"In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location, and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver, if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete."

To the same effect is

Farrell v. Lockhart, 210 U. S. 142.

In view of the provisions of said Sec. 2326 and giving effect to these decisions upon what theory can it be contended that the appellants, under the circumstances assumed, should be permitted to show the existence of prior locations and the invalidity on that account of the placer patent? Answering this question we will say that in our judgment the only possible theory is suggested in the case of

Dahl v. Raunheim, 132 U. S. 264; 33 L. Ed. 325 which was an action to quiet title to certain ground, the plaintiff asserting title by reason of the issuance of a Receiver's receipt in patent proceedings based upon a placer location, and the defendant asserting title by reason of an attempted lode location covering a portion of the same ground, the lode location having been made subsequent to the date of the placer application, and there having been no adverse claim filed by such lode claimant. It was held that the lode claimant having failed to adverse the placer application was precluded from questioning the right of the plaintiff to a patent, and that the only question open to him was whether the lode or vein claimed by him was known to exist at the date of the placer application. In the course of the opinion the court said:

"The plaintiff applied for a patent for its placer ground in November, 1880, and notice of the application was published by the register of the local land office, and all other provisions of the statute required in such cases were complied with. No adverse claim was filed by the defendant or anyone else during the period of publication. The Dahl lode claim was not located until after that period had expired. The defendant is therefore precluded from questioning the right of the plaintiff to a patent for the premises, and, of course, from objecting either to the location or its character as placer ground. The only question open to him in this controversy is whether the lode or vein claimed by him was known to exist at the date of the plaintiff's application."

In order to show that there is not an indisputable presumption to the effect that there were no conflicting claims as against the placer applicant, it is necessary to show the existence of a known vein that was of sufficient value to justify exploitation and definitely ascertained at the date of the placer application and such vein with an area of surface ground on each side not exceeding 25 feet must be definitely described, for it is only by such showing that an area may be shown to have been reserved from the placer application. If not so reserved Sec. 2325 applies and in the absence of an adverse claim all prior claims are barred. If the appellants therefore rest their claim on an attempt to show the existence of prior lode locations at the date of the issuance of patent, they cannot thereby avoid the necessity of making proof of all of the facts which it is necessary that they should make if their case was rested instead on the claim of a vein or veins known to exist at the date of the placer application.

There is nothing in the case of *Noyes v. Mantle*, 127 U. S. 348, to support the appellants' contention. It appears from the opinion in that case that it was found by the trial court that the vein attempted to be located as the Pay Streak lode was known to exist by the placer applicant at the date of his application for patent, and it may have been that there was evidence in the case and the court may have found that the vein was definitely ascertained at the date of the placer application and then of sufficient value to justify exploita-

tion, and it may be that the vein with an area of enclosing surface ground was definitely described, and that such area did not exceed twenty-five feet on each side of the vein. There is nothing, whatever, in the opinion which indicates any different state of facts. If so, then the vein with such enclosing surface area was reserved by the said Sec. 2333 and being so reserved the lode claimant was not barred on account of his failure to adverse the placer application.

IV.

From *Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.*, 143 U. S. 394, we quote the following:

“The plaintiff to maintain its case offered in evidence simply its patent and other matters of record together with parol proof of the boundaries. After the introduction of this testimony the plaintiff rested, and by it a prima facie title to the whole placer claim was established.”

The same rule was stated in

Migeon v. Montana Central Railway Company,
68 Fed. 811,

and the decision in that case was affirmed by this court in

Montana Central Railway Company v. Migeon,
77 Fed. 249,

and the rule by it reasserted in

Thomas v. South Butte Mining Co. (not yet reported).

The rule as stated in the Migeon case was followed by the Supreme Court of Montana in the case of

Casey v. Thieviege, 19 Mont. 342; 48 Pac. 394.

The rule was stated in

Cripple Creek Mining Company v. Mount Rosa Mining Company, 26 L. D. 622,

in the following language:

“The placer claimant has a government patent for the land in controversy, *obtained upon a showing held by the land department to establish the placer character thereof*, and the lode claimant has attacked that patent, alleging that this land contained, when the patent was applied for, a known vein or lode, and was therefore excepted from the operation of the patent. *This allegation amounts to nothing if not sustained by proof.* The placer patentee is certainly not called upon *to support the title apparently conferred by the patent*, simply because it is assailed by someone who finds therein an obstacle to obtaining title to the same ground. It was, therefore, incumbent upon the lode claimant to establish the truth of its allegations *and the burden of proof then was rightly placed upon it.*”

In the dissenting opinion in

Iron Silver Mining Co. v. Mike & Starr Gold &
Silver Mining Co., *supra*,

Mr. Justice Field, concerning this point, said:

“The presumption in favor of its validity attends the placer patent, as it does all patents of the government of any interest in the public lands which they purport to convey. So potential and efficacious is such presumption that it has been frequently held by this court that if, under any circumstances in the case, the patent might have been rightfully issued, it will be presumed, as against any collateral attack, that such circumstances existed.”

The presumption in favor of the placer patentee until the existence of a known vein is established by proof is the same as the presumption in favor of the lode patentee. As to the presumption in favor of the owner of a lode claim, see the following:

Iron Silver Mining Co. v. Elgin Mining &
Smelting Co., 118 U. S. 196;

Doe v. Waterloo Mining Co., 54 Fed. 935;

Parrott Silver & Copper Co. v. Heinze, 25 Mont.
139, 64 Pac. 326;

State, ex. rel. A. C. M. Co. v. District Court,
25 Mont. 304;

Maloney v. King, 30 Mont. 159.

As the placer patent is *prima facie* evidence of title in the placer patentee of everything beneath the sur-

face of the ground covered by such patent it necessarily follows that the burden is on one claiming a portion of such ground on account of the existence of a known vein to establish by proof the fact of the existence of such known vein.

V.

Congress in adopting the said Sec. 2333 did not undertake to define the term "vein." Sec. 2333 states, however, that the vein or lode referred to is such as is described in Sec. 2320. A mineral deposit, in order to constitute such a vein according to the decisions of the courts must have definite boundaries and be of sufficient value to justify exploitation.

In the

Eureka case, 4 Sawyer 302, Fed. case No. 4548,

Justice Field defined a lead as follows:

"To determine whether a lode or vein exists, it is necessary to define those terms, and as to that it is enough to say that a lode or vein is a body of mineral or mineral-bearing rock *within defined boundaries*, in the general mass of the mountain. * * * * A continuous body of mineral or mineral-bearing rock extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formations; but if it is not continuous or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it

lacks the individuality and extension which is an essential quality of a lode or vein."

In

Iron Silver Min. Co. v. Mike & Starr Min. Co.,
143 U. S. 494, 36 L. Ed. 211,

Mr. Justice Field said:

"As stated above, there can be no location of a lead or vein until the discovery of precious metals in it has been had, and then it is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent on ground embracing it, but those only which possess these metals in such quantity as to enhance the value of the land and invite the expenditure of time and money for their development."

And in another portion of the opinion it was said:

"But as I shall show hereafter, the mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify the expenditure of money for the development of the mine and the extraction of the mineral."

In

Iron Silver Min. Co. v. Chesman, 116 U. S. 529,
Mr. Justice Miller said:

"A continuous body of mineralized rock lying within any other well defined boundaries on the earth's surface and under it, would equally constitute in his (the miner's) eyes a lode."

The United States Circuit Court of Appeals for the Eighth Circuit, in the case of

San Francisco Chemical Co. v. Duffield, 201 Fed. 830,

and this court in the case of

Duffield v. San Francisco Chemical Co., 205 Fed. 480,

have given practically the same definitions.

Before a mineral deposit which answers to the definition of a vein can be held to have been known to exist within the limits of ground for which an application for placer patent had been made, it must be definitely ascertained, and the existence of the values which would justify exploitation must be known. The law was declared by this court in

Migeon v. Montana Central Ry. Co., *supra*,

in the following language:

"If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying \$5 an acre for that portion of the ground, and \$2.50 an acre for the balance, a patent will issue to him, covering both the lode and placer ground; but, if the lode is known to exist, and is not included in the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right of possession, by virtue of his patent for the placer ground, to the vein or lode. It matters not whether there is a

lode or vein actually within the limits, which subsequent developments may prove, if it is not known to exist at the time of the application the patent for the placer claims will include such lode or vein. In such cases the supreme court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other precious metals to justify their designation as "known veins or lodes"; that, in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable and on that account, and justify their exploitation."

The language of the Supreme Court in

United States v. Iron & Silver Mining Company, 128 U. S. 674,

"To get that designation the lodes or veins must be clearly ascertained."

Mr. Justice Field in

Sullivan v. Iron Silver Mining Company, 143 U. S. 431, 36 L. Ed. 214

in defining a vein known to exist said:

"Before a vein or lode may be deemed to fall within those excepted from the placer patent as a known lode existing at the time of the application of the patentees, the lode must be discovered and located so far as to be capable of measurement."

And in

Iron Silver Min. Co. v. Mike & Starr Co., *supra*, in discussing this point, said:

"And to embrace the lode within the patent of a placer claim the applicant must, if it be known, pay for it at the rate of five dollars per acre. But he cannot pay any sum, or offer to pay so as to be effectual, until he can ascertain the number of acres contained in the lode claim desired, that is, until the ground can be measured. Nor could the officers of the land department accept any sum from the applicant until such measurement, upon a mere speculative opinion as to the extent of the supposed lode."

And in another part of the opinion he said:

"In such cases (referring to the case of an application for patent on a placer claim within which was a known lode) if the lode claim is known to the applicant to exist he must designate it in his application, but it cannot, of course, be known to him to exist, whatever his conjectures may be, until the lode is discovered and located so as to enable him to state its existence and extent in his application for a patent for the placer claim and to tender the price per acre required. If there be any variance between these views and those expressed in *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, as to the manner in which knowledge of the existence of a lode within the boundaries of a placer claim may be obtained, it is because of a more careful consideration of the subject in later years than formerly and of larger experience in mining cases."

In

Noyes v. Clifford, 37 Mont. 138,

the Supreme Court of Montana said:

“The burden is cast upon the adverse claimant to show, not only that the vein or lode upon which he founds his claim falls within the recognized definitions of these terms, but also that it was known to exist as a clearly ascertained vein, and sufficient in extent to render the land more valuable because of it, and to justify its exploitation in order to extract and utilize its contents.”

From the authorities quoted above, it is clear that what is meant when it is said that a vein must be definitely ascertained at the date of the placer application before it can be held to answer to the designation of a vein known to exist is not only that the fact that a vein exists is definitely ascertained, but that the boundaries of the vein must be so ascertained. Until the boundaries of the vein are determined, the area of enclosing surface ground which is excepted by reason of the known existence of the vein, cannot be determined, since such area of enclosing surface ground does not exceed twenty-five feet on each side of the vein. Until such area of such surface ground can be determined it cannot be reserved or excepted from the patent. The applicant for placer patent may, by express declaration, except it to the extent that it may be measured, but to no greater extent, and for the same reason such area is by implication, on account of the

failure of the applicant to include in his application an application for patent of the vein or lode claim, excepted to the same extent, but to no greater extent.

Counsel for the appellants are evidently of the opinion that if at the time of the making of an application for patent on a placer claim a lode within the boundaries of such ground has been uncovered and is disclosed for any distance along its length, but is entirely covered and unexplored and unknown through the remainder of its length, that the whole vein through its entire extent, so far as it is embraced within the placer claim, is reserved and excluded from the patent of the placer claim by the failure of the applicant for patent to make application for patent also upon the lode claim. We submit that there is no support for such contention in any of the decided cases.

The case of *Reynolds v. Iron Silver Mining Company*, 116 U. S. 687, and *Iron Silver Mining Co. v. Reynolds*, 124 U. S. 374, was an action of ejectment brought by the plaintiff, the Iron Silver Mining Company against Reynolds and another, in a court in Colorado. The plaintiff's claim of title was based upon a placer patent to the ground in controversy, was controverted by the defendants on the theory that at the time of the application for patent for such placer ground there was within such ground a vein or lode known to exist, and that the same was on that account reserved and excepted from the placer patent. The case was tried to a jury, which was instructed by the

court to return a verdict for the plaintiff. The case having been brought by a writ of error into the Supreme Court, the error assigned was an instruction to the jury to the effect that title on the part of the plaintiff was not essential to a recovery, since the defendants showed no title in themselves. This assignment of error was sustained and the judgment of the lower court was reversed. No other question arose in the case, though in the course of the opinion it was said that Congress meant that lodes and veins known to exist when the placer patent was asked for should be excluded from the grant as much as if they were described in clear terms in the patent. This statement of the court referred entirely to the description of such vein in the patent, and had no reference to the question of whether a vein could be held to be excepted beyond the extent to which it was definitely ascertained and capable of measurement at the time of the placer application. The case having been sent back to the lower court for a new trial, a second trial was had to a jury and the plaintiff offered in evidence in addition to the placer patent, evidence of a lode location covering the lode claimed on the previous trial by the defendant to have been excepted by the placer patent, but such evidence was rejected, and the single question then to be tried being the question of the knowledge on the part of the plaintiff of the existence of the lode in question at the time of the placer application, evidence was offered by the defendant and

admitted by the court as to the belief of the plaintiff as to the existence of a lode, and upon the submission of the case to the jury they were instructed that it was unnecessary to state what circumstances might be sufficient to charge a patentee with knowledge as declared by the statute, for if in any case it appeared that an application for a patent was made with intent to acquire title to a lode or vein which might exist in the ground beneath the surface of a placer claim, a patent issued upon such application could not operate to convey such lode or vein.

The case having been brought again to the Supreme Court it was held that in the rejection of such testimony offered by the plaintiff, and in the admission of such testimony by the defendant as well as in the instruction given to the jury, that the court erred and the judgment of the lower court was again reversed.

In *Noyes v. Mantle*, *supra*, the question determined was as to the knowledge of the placer applicant of the existence of a vein or lode within the ground covered by the placer application, such vein or lode having been located prior to the date of the placer location, and the location being afterwards kept alive by annual representation work. It was held that the recording of the declaratory statement of location was sufficient to charge the placer applicant with knowledge of the existence of the lode claim.

There was no question in that case as to whether or not the vein in question was definitely ascertained at the time of the placer application.

In *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, the vein which was in controversy was what is known as a blanket vein, being a horizontal deposit. It does not appear from the opinion the extent of the development upon such blanket vein at the time of the placer application, but, of course, there could be no question in the case as to the area of surface ground enclosing such vein, for the reason that the ground which enclosed it was above it and below it, and not on either side in a horizontal direction. In the majority opinion of the court there is no discussion of any question concerning the sufficiency of the determination of such vein at the time of the placer application. The questions decided in the majority opinion of the court were, first, whether the verdict of the jury should be disturbed on the ground that the evidence was insufficient to show that the vein was one which would have justified exploitation and development at the time of the placer application; second, whether a vein could be held to be known within the meaning of the statute unless it had been covered by a quartz lode location at or prior to the date of the placer application; and third, whether error in the instructions to the jury as to the time when such vein must be known to exist in order to be excepted from the placer patent was prejudicial error.

VI.

It is evident that since the production of the patent is prima facie evidence of title in the placer patentee as to everything embraced within the area covered by such patent that it is incumbent on any person undertaking to claim a part of that which is covered by such patent, either by reason of the existence of a known vein at the date of the placer application or by reason of a prior lode location to furnish a description of the vein with twenty-five feet of surface ground on each side of it. In the case of South Butte Mining Co. v. Butte & Veronica Copper Mining Co., *supra*, a decree was rendered in favor of the defendants which purported to give to them an area of ground covered by an attempted lode location but which was not limited to twenty-five feet on each side of the vein. The decree was held to be erroneous for that reason and set aside on petition for rehearing. A portion of the opinion on rehearing is as follows:

“The decree in this case is erroneous, and is hereby ordered set aside and vacated.

“I still think, however, that the defendants must prevail generally, but the extent to which their rights should be upheld must be limited. Under Sec. 2333 R. S. U. S. they can only take a decree for the lode referred to in the memorandum opinion as having a southeast, northwest strike and a southerly dip, and which was well known to exist prior to Oct. 21, 1881; and for twenty-five feet of surface on each side thereof.

"But to define the lode with satisfactory precision is, I think, impossible under the evidence; and as the surface to belong to the defendants can only be described after the lode is defined, it becomes equally impossible to define the surface area with accuracy.

"The burden of proving the right to the lode having been put upon defendants as lode claimants, it is still upon them to prove the size or extent and strike of their lode with a definiteness sufficient to enable the court to describe the lode in order to define the surface, for it is only the lode, and 25 feet of surface on each side of the lode that they are entitled to."

VII.

The importance of the stability of titles based upon patents from the government is a sufficient reason for the rule which does not permit such patents to be set aside or their effect defeated by claiming land upon the plea that it was reserved, except upon clear and convincing testimony.

We submit as very pertinent here the language of Mr. Justice Field in

Iron Silver Min. Co. v. Mike & Starr Gold &
Silver Min. Co., *supra*,

as follows:

"As the lode claim of the defendant in this case embraces a little over ten acres, it is difficult to believe that the applicant for a placer claim embracing it, if it was known to exist at that time,

would have neglected to apply for it when it could have been obtained at the trifling expense of \$26.00. The opportunities for others invading the placer boundaries, if within them there was a known vein or lode, would naturally have been the occasion of much uneasiness to the owners of the placer claim, to avoid which we may well suppose they would readily have incurred expense vastly above the government price of the lode claim. Clear and convincing proof would seem, therefore, to be necessary to overcome the presumption thus arising that the applicant for the placer patent did not know at the time of the existence of any such lode."

In

Iron & Silver Mining Co. v. Mike & Starr Gold & Sil. Mining Co., *supra*,

the court in the course of the opinion said:

"As was said by the Circuit Court in the Eureka case, a patent for a mining claim is iron clad in its potency against all mere speculative inferences."

The placer applicant before he is allowed to make final proof is required to furnish evidence of the non-existence of known veins within the ground covered by his application. The rule stated in the

Maxwell Land Grant case, 121 U. S. 325,

is applicable therefore to a case where a portion of the land covered by placer patent is claimed on account of the alleged existence of a known vein as well as to a case where the effect of a patent is attempted to be

defeated on account of the alleged existence of prior existing lode locations. The language of the court in that case is as follows:

"The deliberate action of the tribunals to which the law commits the determination of all preliminary questions and the control of the process by which this evidence of title is issued to the grantee, demands that to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which such an instrument may be avoided."

In

Grand Central Min. Co. v. Mammoth Min. Co.,
83 Pac., at page 677,

the Supreme Court of Utah stated the rule that strict proof is required to overcome a prior grant, as follows:

"In the case where two miners assert rights based upon separate alleged discoveries on the same vein, neither is hampered with presumptions arising from a prior grant of the tract, to overcome which strict proof is required. In applying a liberal rule to one class of cases and a rigid rule to another, the courts justify their action upon the theory that the object of each section of the Revised Statutes, and the whole policy of the entire law, should not be overlooked."

VIII.

A certified copy of the recorded declaratory statement of the location of a mining claim is only evidence of the facts which by law are required to be stated in it.

1 Lindley on Mines, 2nd Ed., Sec. 392.

The provision of the Statutes of the State of Montana relative to the recording of a declaratory statement of location in 1891, are to be found in

Com. Stat. Montana, of 1887, Fifth Div.,
Sec. 1477 and 1479,

which read as follows:

Sec. 1477. Any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, who shall hereafter discover or locate any placer deposits of gold, or other deposit of minerals, including building stone, limestone, marble, coal, salines and saline springs, clay, sand or other mineral substances having a commercial value, shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery or location is made, a declaratory statement thereof, in writing, on oath made before some person authorized by law to administer oaths describing such claim in the manner provided by the laws of the United States.

Sec. 1479. That in order to entitle any per-

son or persons to record in the county recorder's office of the proper county, any lead, lode or ledge, there shall first be discovered on said lode, lead or ledge, a vein or crevice of quartz, or ore with at least one well defined wall.

The requirement of the laws of the United States on this point is to be found in Section 2324 of the Revised Statutes, which provides that within twenty days after making such discovery the locator must make and file in the office of the Recorder of the County in which such discovery was made a declaratory statement thereof, which shall contain the names of the locators, the date of location, and such a description of the claim located, by reference to some natural object or permanent monument, as will identify it.

IX.

Sec. 2320 R. S. U. S.

requires that the location must be distinctly marked on the ground so that its boundaries can be readily traced. The description of the marking of such boundaries or any statement that such boundaries were marked on the ground is not required to be stated in the declaratory statement of the location. Independent proof therefore is required of the fact of the marking of such boundaries and of the further fact of the making of a discovery.

X.

From

2nd Edition of Lindley on Mines, Sec. 644,
we quote as follows:

“Abandonment is a question of fact to be determined by the jury. No arbitrary rule can be laid down which will satisfy all cases. The question being one purely of intent, the fact is to be determined by the acts and conduct of the party. It may be expressed or implied; it may be effected by plain declaration of intention to abandon, and it may be inferred from acts or failures to act so inconsistent with an intention to retain it that the unprejudiced mind is convinced of the renunciation.”

To the same effect see

27 Cyc. 596;

Migeon v. Montana Central Railway Co.,
supra;

Harkrader v. Carroll, 75 Fed. 474.

XI.

Testimony cannot be taken after the time allowed by law for the taking of the same has expired. If an application then be made for an order for the allowing of the taking of such testimony it is necessary that a showing of diligence be made.

Equity Rule 69;

Western Electric Co. v. Capitol Telephone Co., 86 Fed. 769;

Lister v. Clark, 9 Fed. 854.

XII.

The quotation already made from the case of

Dahl v. Raunheim, *supra*,

is to the effect that the issuance of the patent conclusively determines the placer character of the ground. To the same effect is:

Washoe Copper Co. v. Junilla, *supra*.

XIII.

Since the issuance of placer patent conclusively determines that the ground is placer in character, evidence is, of course, inadmissible to show that the ground is not of such character or that it has never been worked for that purpose.

Washoe Copper Co. v. Junilla, *supra*.

XIV.

From the very nature of the case there can be no presumption of the continuance of a vein beyond the point where it is actually known to exist. Veins, of course, do not continue indefinitely. If not cut off by faults, they otherwise come to an end, or as miners say, "pinch out." Dislocation of veins by faults is of frequent occurrence and without underground development no one can say where such fault will be discovered. From the very nature of the case there can, therefore, be no presumption of

the continuance of a vein beyond the place where it is actually exposed or if it continues there can be no presumption that it will continue on the same strike.

From

Iron Silver Mining Co. v. Mike & Starr Gold
& Sil. Co., *supra*,

we quote as follows:

“It is a matter well known to persons at all familiar with mining for the precious metals that veins rich in gold and silver are generally found with barren rock within a few feet on each side of them, and that such veins more frequently than otherwise come abruptly to an end. No one thus familiar would feel justified in concluding from the mere distance or vicinity of other mines that they had any necessary connection with each other. In accordance with this doctrine this court held *Dahl v. Rauheim*, 132 U. S. 260, 263 (33; 324, 325), that the discovery by the defendant in that case of a lode two or three hundred feet outside of the boundaries of the placer claim in suit did not create any presumption of the possession of a vein or lode within those boundaries, nor, we may add that a vein or lode existed within them.”

Appellee respectfully submits that the decree appealed from should be affirmed.

Respectfully submitted,

JOHN A. SHELTON,

Solicitor for Appellee.

"The decree in this case is erroneous, and is hereby ordered set aside and vacated.

"I still think, however, that the defendants must prevail generally, but the extent to which their rights should be upheld must be limited. Under Sec. 2333 R. S. U. S. they can only take a decree for the lode referred to in the memorandum opinion as having a southeast, northwest strike and a southerly dip, and which was well known to exist prior to Oct. 21, 1881; and for twenty-five feet of surface on east side thereof.

"But to define the lode with satisfactory precision is, I think, impossible under the evidence; and as the surface to belong to the defendants can only be described after the lode is defined, it becomes equally impossible to define the surface area with accuracy.

"The burden of proving the right to the lode having been put upon defendants as lode claimants, it is still upon them to prove the size or extent and strike of their lode with a definiteness sufficient to enable the court to describe the lode in order to define the surface, for it is only the lode, and 25 feet of surface on each side of the lode that they are entitled to."

OFFICE OF THE CLERK OF THE DISTRICT
COURT, OF THE UNITED STATES, IN
AND FOR THE DISTRICT OF
MONTANA.

UNITED STATES OF AMERICA,
STATE OF MONTANA,
COUNTY OF SILVER BOW,—ss.

I, George W. Sproule, Clerk of the United States District Court, for the district of Montana, do hereby certify that the above and foregoing, consisting of one page, is a full, true and correct copy of a portion of the opinion on rehearing filed in the office of the Clerk of the United States Circuit Court, in and for the District of Montana, in the case entitled South Butte Mining Co., a corporation, complainant, vs. Butte & Veronica Copper Mining Co. and Michael J. O'Farrell, defendants, numbered 324, in the files of said court, which said files are now in my care and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said court at Butte, Montana, this 3rd day of February, 1914.

GEO. W. SPROULE,

Clerk.

By HARRY H. WALKER,

Deputy Clerk.

(SEAL)

**United States
Circuit Court of Appeals
For the Ninth Circuit.**

LOUIS MASON, L. O. CLARK, JOHANNA FAR-
LIN, C. C. CLARK, L. P. FORESTELL,
A. F. BUSHNELL, JOHN DOLAN, PAT
LEROUS, J. T. FITZGERALD, and
ELIZABETH BROWN,

Appellants,

vs.

WASHINGTON-BUTTE MINING COMPANY,
a Corporation,

Appellee.

**Upon Appeal from the United States District Court
for the District of Montana.**

Book of Original Exhibits.

[Exhibits not Comprised in the Transcript of the Record.]

FILED

JAN 30 1914

No. 2323

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOUIS MASON, L. O. CLARK, JOHANNA FAR-
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Upon Appeal from the United States District Court
for the District of Montana.

Book of Original Exhibits.

[Exhibits not Comprised in the Transcript of the Record.]

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1/2 Sec Cor

COPPER QUEEN

B & B Placer Disc
K 4 + 5

RABBIT

30

OLIVIA

HORNET

32

GULF

HOPE

PLEASANT VIEW

36

37

BULLWHACKER

2-1-1

COPPER QUEEN

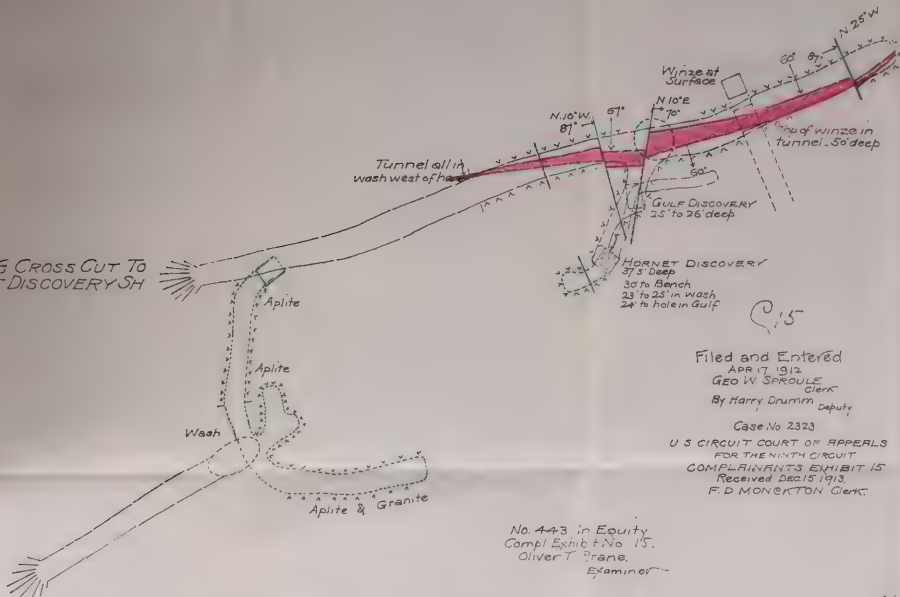
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Age 11 3/4
GEO W. SPENCE, Clerk
By Harry D. Brown, Deputy

Case No 2023
U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
COMPTON, et al. vs. SPENCE
Recorded 10-11-13
FD. MAR. 10, 1914

CHARTERED BY THE LOCATION
SOUTH BOSTON, MASS.

No. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

TUNNEL & CROSS CUT TO
HORNET DISCOVERY SH



Filed and Entered

APR 17 1912

GEO W SPROULE

Clerk

By Harry Drumm Deputy

Case No 2323

U S CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMPLAINANTS EXHIBIT 15

Received DEC 15 1913

F. D. MONKTON Clerk

No. 443 in Equity
Compl Exhibit No. 15.
Oliver T. Prane.

Examiner

1 in = 20 ft

C-16

Filed and Entered

APR 17 1912

GEO. W. SPROULE
Clerk

By Harry Drumm
Deputy

Case No 2323

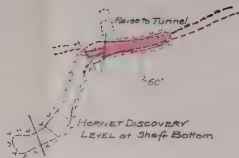
U.S. CIRCUIT COURT OF APPEALS

FORTHENINTH CIRCUIT

COMPLAINANT'S EXHIBIT 16

Received DEC 15 1913

F D MORGENTHAU Clerk

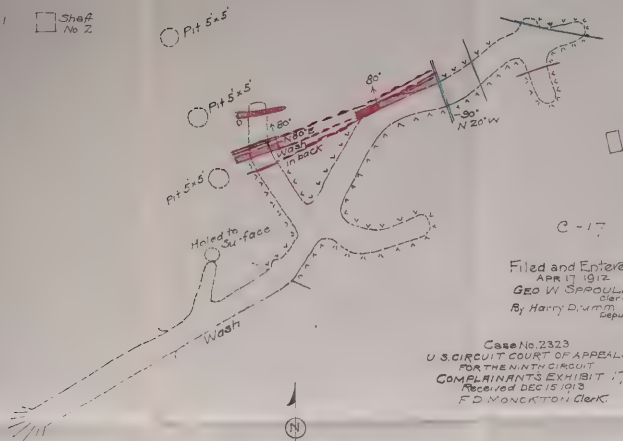


In 4423 in Equ IV
Comp. Exhibit No 16
Silver T. Crane

Examiner

1 in = 20 ft

Olivia Disc
☐ Shaft No 1 ☐ Shaft No 2



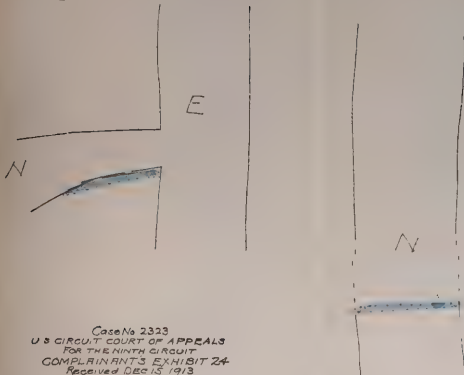
C-17
 Filed and Entered
 APR 17 1912
 GEO W SPOULE, clerk
 By Harry D. Wynn, Deputy

Case No 2323
 U.S. CIRCUIT COURT OF APPEALS
 FOR THE NINTH CIRCUIT
 COMPLAINANTS EXHIBIT 17
 Received DEC 15 1913
 F.D. MONCKTON, Clerk

ONE YEAR OLIVIA DISCOVERY
 1 in = 20 ft

No 443 In Equity
 Compl Exhibit No. 17
 Oliver T. Crane, Examiner

C-24



Case No 2323
U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
COMPLAINANTS EXHIBIT 24
Received DEC 15 1913
F D MORGENTHAU, Clerk.

Filed and Entered
APR. 17 1912
Geo W SPROULE, Clerk
By Harry Drumm Deputy

No 443 In Equity
Compl Exhibit No 24
Oliver T Crane,
Examiner

C-29

Case No 2323
U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMPLAINANT'S EXHIBIT 29.

Received DEC. 15. 1913

F. D. MONCKTON, Clerk.

Saddles



Seam

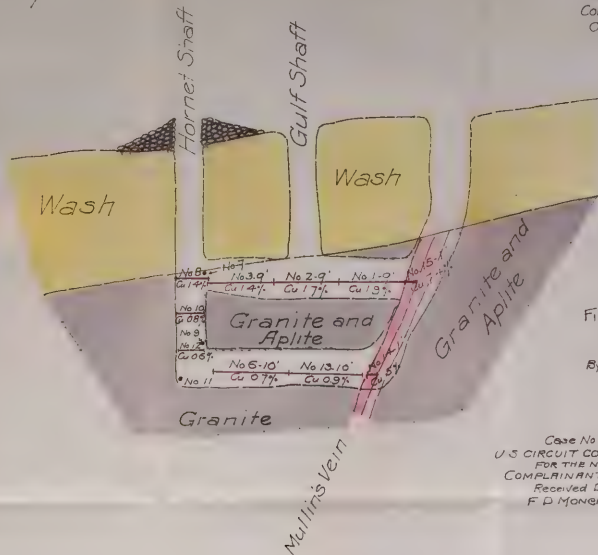
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APR. 17. 1912
GEO. W. SPROULE, Clerk
By Harry Drummond, Deputy.

No. 443 In Equity
Compl. Exhibit No. 29
Oliver T. Crane,

Examiner.

c. 37

No 443 In Equity
Compl Exhibit No 37
Oliver T Crane,
Examiner



Filed and Entered
APR 17 1912
GEO W SPROUL
Clerk
By Harry Drumm, Deputy

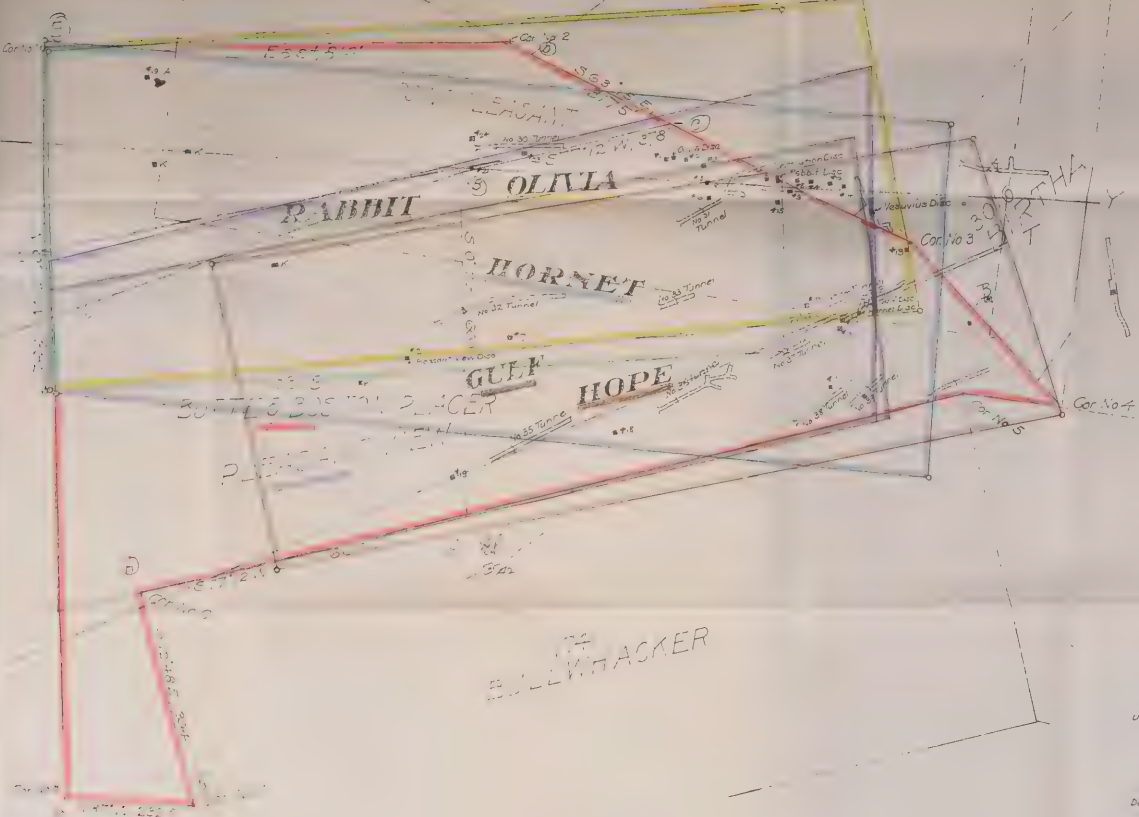
Case No 2823
U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
COMPLAINANTS EXHIBIT 37.
Received DEC 15 1913.
F D MONEKTON, Clerk

1 inch = 10 feet

108°
S. 75° 10' E. SUN

3950
COPPER QUEEN

2327
S. 75° 10' E. C



Field and E. P. 100
100 - 100
See in drawing
See in drawing
See in drawing

City No 2327
U. S. DIST. COURT OF ARIZONA
RECEIVED
DEPARTMENT OF MINES
RECEIVED
RECEIVED

No 2327 - Equity
Defendant's Exhibit
No 100
No 100
No 100

SC-11

Sur No 3859
COPPER QUEEN

RABBIT

OLIVE

HORNET

HOPE

OUT

PLEASANT VIEW

Sur No 3816
BIRTA

Sur No 78
COLEEN BAY

Sur No 74
SULLYMARKER

C - 104
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JAN 13 2
GEO - CHAMBER
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Page No 2523
U.S. DISTRICT COURT OF APPEALS
FROM THE DISTRICT COURT
COMM. RIGHTS EXHIBIT 44
FILED DEC 5 193
F.D. MONTGOMERY BANK

See 3
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COT. [illegible]
Clerk [illegible]

3 3-3-

Filed at Federal

Apr 17 1912

GEO W JARVILLE

Clerk

By Harry L. Lummey

Deputy

Cash No 4323
U.S. DISTRICT COURT OF APPEALS
NINTH CIRCUIT
OFFICE OF THE CLERK
RECEIVED APR 18 1912
H. W. JARVILLE, Clerk

APR 18 1912
RECEIVED
U.S. DISTRICT COURT
NINTH CIRCUIT

1972
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281
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TOKRID

4854
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Jan 1 '88

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STELLA

John Hurday
Mrs. Hane
Schmitt
Mrs. Moller
Mrs. Hansch

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APR 42 879

6210
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6755
TOKRID

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1761
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Apr 5 '90
1880

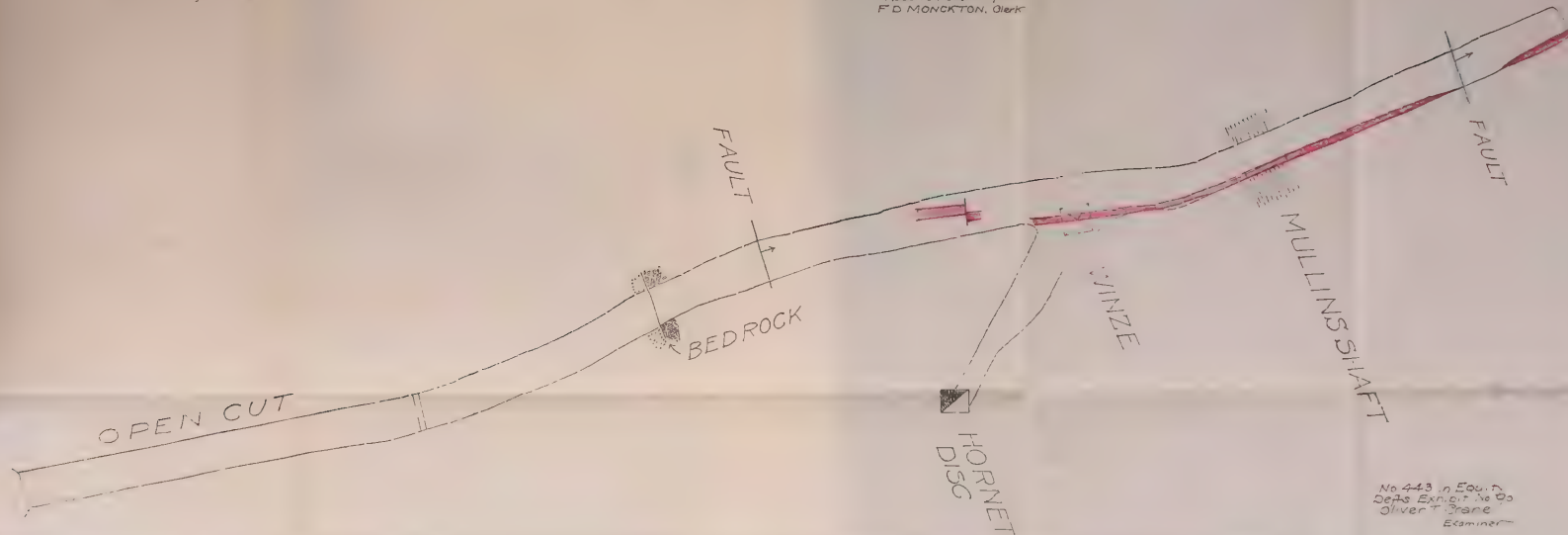
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1880 Exhibit No
Over 1000

1880

PLAN OF
No 34 TUNNEL
Scale, 1"=10'

D. 90
Filed and Entered
APR. 7 1912.
GEO W SPROULE, Clerk
By Harry Brumby, Deputy

Case No 2323
U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
DEFENDANTS EXHIBIT 90
Received DECEMBER 1913
F D MONCKTON, Clerk



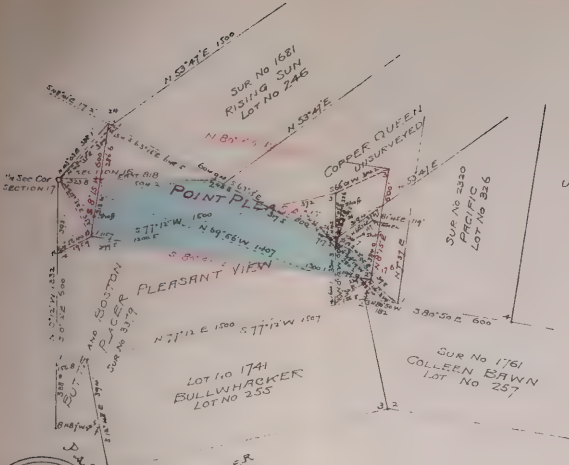
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Depts. Exhibit No 90
Oliver T. Crane
Examiner

By Harry Drumm

EXPERIMENT 1

Oliver T. Crane
Examiner

on appeal on 1 and 2000

[illegible]

the air in the ground, and the ... of ... 1891.

... will Shalte aggregating 1461.5 in debt

Travel in Canada

Notary Public

EXHIBIT C

In the matter of the application of
Simcon V Kemper et al for a
United States Patent for The Butte &
Boston Placer

D-111

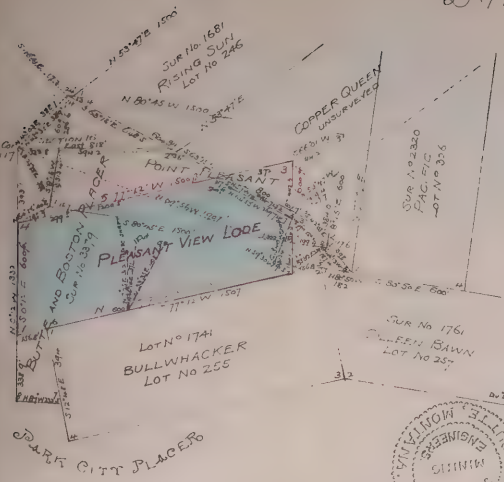
I, E. H. Harney, Judge of
Sept. 4 of the District Court
of the second Judicial
District of the State of Mon-
tana, hereby certify that
the within map is a
part of Exhibit No. E intro-
duced in evidence in
Cause No. 9000, entitled
Butte Land & Investment
Co et al v R. O. Merriam
et al and referred to
on page 207 of the transcript
on appeal in said cause.

Judge

Filed and Entered
APR 17 1915
GEO W SPANGLER CLERK
By Harry W. Brumm Deputy

Case No 2323
U S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
DEPT. JUNE 11 1915
Received U.S. \$ 5.75
FD MONTGOMERY PARK

No 443 In Equity
DEPT. EXHIBIT No 111
Oliver T. Crane, Attorney



I, Nathaniel C Ray United States Agent, Mineral Surveyor for...
do hereby certify that the above diagram, heretofore represented the conflict
claimed to exist between the Butte and Boston lode, Placer, Mineral Survey,
No 2323 in T 3 N, R 7 W, claimed by Simcon V Kemper et al situated in
No. organized Mining District, Silver Bow County, Montana and the Pleasant
View Lode, claimed by, Chas. J. Packer more or less as actually surveyed by me
upon the ground on the 8th day of June, A D 1891.

The boundary lines, courses and distances of the Pleasant View Lode
are represented in red ink, those of the Butte & Boston Lode in green ink.
represented in black ink and the area, amount of 5.07 acres, of which
4.15 acres are in conflict with the Point Pleasant Lode, is indicated blue.

I further certify that the value of the mine and improvements placed
upon the said Pleasant View Lode by the Advertisements and Perforations
mineral to the sum of Five Hundred & Fifty nine dollars, (\$559.00) and
that said improvements consist of Discover, Shaft 1 cut and three shafts
valued at Five Hundred and Fifty-nine dollars. (\$559.00)

NATHANIEL C RAY
U S Deputy Mineral Surveyor

(Notarial Seal)
Dated at Butte City, Mont June 15th 1891
Subscribed and sworn to before me this 15th day of June, A D, 1891
FRANK M LEONARD,
Notary Public

CASE NO. 2023
U.S. CIRCUIT COURT OF
FOR THE DISTRICT OF
DEFENDANTS SITH P.
Received DE 15
P.D. MORGANTON

F. J. AND E. J. 2023
APR 7 1912
JED W. DELOUE
S. J. DELOUE Deputy

BUTTE AND BOSTON
APP. CAT. NO. 685

BUTTS MONT MINE
APP. CAT. NO. 948

PLANE

LENGTH 4.

NO. 2 SHaft

RISEING SUN

OLIVE A

RABBIT

OLIVE B

HORNET

GULF

BUTTE BOST
PLACER

HOPE

PLES VIEW

BULLWHACKER

SCALE 1:1000

EAST

0 1000

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NO. 4
NO. 5
NO. 6
NO. 7
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NO. 98
NO. 99
NO. 100



No. 2337

5

United States
Circuit Court of Appeals

For the Ninth Circuit.

M. C. WOOD,

Plaintiff in Error,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Eastern District of Washington,
Northern Division.

FILED

DEC 12 1913

No. 2337

United States
Circuit Court of Appeals

For the Ninth Circuit.

M. C. WOOD,

Plaintiff in Error,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court
of the Eastern District of Washington,
Northern Division.**

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

W. H. PLUMMER, Old National Bank Building,
Spokane, Washington,

Attorney for Plaintiff in Error.

CANNON, FERRIS & SWAN, Old National Bank
Building, Spokane, Washington,

Attorneys for Defendant in Error. [1*]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Complaint.

Plaintiff complains of defendant and for cause of
action alleges:

I.

That plaintiff is a resident and citizen of the State
of Washington.

II.

That defendant is now, and was at all times herein
mentioned, a corporation, created, organized and ex-
isting under and by virtue of the laws of the State
of Maine, and a citizen of the State of Maine, and
carrying on a large lumber and sawmill business at
Potlatch, State of Idaho.

*Page number appearing at foot of page of original certified Record.

III.

That on, and for some time prior to the 21st day of September, 1911, plaintiff was in the employ of defendant with a gang of men engaged in repairing a certain brick structure connected with, and used by said defendant as a part of the sawmilling plant, said brick structure being a part of what is known as a burner, to which is conveyed certain waste materials for the purpose of being burned and destroyed, and plaintiff was employed and carrying on the duties exclusively of making and mixing mortar for the laying [2] of brick in repairing said brick wall, and at no time did he have anything to do with any other part of the work in and about said sawmilling and lumber plant and business.

IV.

That he was under the charge of a certain foreman employed by defendant by the name of Nelson who had charge of said plaintiff and the gang of men with whom plaintiff was employed and working.

V.

That as one of the appliances of said sawmilling plant there was constructed and used an apparatus known as a conveyor, being a long endless chain structure constructed and set up in such a manner so that the slabs and waste material could be, by the operation of said endless chain, conveyed from said sawmill a considerable distance from said mill, the same being built on an incline so as to carry forward said slabs and waste materials out to the burner where said slabs and waste materials were burned; that the top, floor and platform of said structure was

about 35 feet above the ground and place where plaintiff was performing his duties for said defendant.

VI.

That alongside of and beneath said conveyer there was certain passageways upon the ground which was provided and constantly used for and by men and teams in going to and from certain parts of said saw-milling plant for various purposes.

VII.

That a short time before the injury to plaintiff hereinafter complained of a certain gang of men in the employ of defendant, including the foreman thereof, was to work, and required to work upon said floor and platform of [3] said structure immediately above and over the passageways where plaintiff and other employees were required to constantly pass, and said gang of men was required to and engaged in handling and using certain heavy timbers, building and tearing down certain scaffolding and structures, and using and handling certain heavy timbers, boards and lumber in the repairing of said conveyer.

VIII.

That plaintiff had no knowledge of said gang of men working on said conveyer and structure up, over and above the said passageway where he, the said plaintiff, and other employees were required to and did perform their duties in going to and from certain places in and about their work.

IX.

That defendant negligently and carelessly failed

to warn plaintiff of said men working upon said structure at said point, or inform them of the danger thereof, and defendant failed in any manner to give any warning thereof, or to place any barrier or anything upon or near the ground under said conveyer where plaintiff would be and could be informed of the men working above him, and warn him and prevent him from passing thereunder while said men were working upon said conveyer.

X.

That defendant carelessly and negligently put said gang of men to work upon said conveyer above where plaintiff was required to perform his duties in going thereunder, defendant knowing that it was dangerous for plaintiff to pass under said structures at said place and under where said men were working as had been his custom and habit so to do, and defendant by putting said men to work upon said structure at said place without giving plaintiff any warning thereof or the danger incident thereto, carelessly and negligently failed [4] and neglected to furnish and maintain said passageway under said structure and the place where plaintiff was required to and did perform his duties, reasonably safe.

XI.

That in the performance by plaintiff of his duties in the mixing of mortar and using the necessary materials therefor, he was walking along said passageway upon the ground under said conveyer and under the place where said Finnell and his men were working, plaintiff having gone to the boiler-room to secure some lime and was returning therefrom, and with-

out any warning to plaintiff, and without knowledge on his part of any danger or the intent on the part of said Finnell, the foreman in charge of said gang of men upon said conveyer platform, said defendant, through its agent and servant, the said Finnell, carelessly, negligently and recklessly threw down upon plaintiff a large stick of timber about eight feet long and four inches by six inches in thickness and width, which he, the said Finnell, had been using in the repair of said conveyer, striking plaintiff upon the head, from which he sustained serious and permanent injuries as hereinafter mentioned.

XII.

That in doing and performing the things hereinbefore mentioned on the part of said defendant through its said Foreman Finnell, and the throwing of said timber down upon plaintiff, as aforesaid, defendant negligently and carelessly failed to use reasonable care in furnishing to plaintiff a reasonably safe place in which to perform his duties, and failed and neglected to keep said place reasonably safe, to the end that plaintiff might and could perform his duties with reasonable safety, and said defendant, as aforesaid, failed and neglected to use reasonable care in doing and performing the matters and things being done and performed by said Finnell and the gang of men under him while working upon [5] the platform alongside of said conveyer, and failed in every manner to use reasonable care in said operation, to the end that plaintiff should not be injured, and negligently and carelessly placed said gang of men to work handling timbers and lumber immediately

above where plaintiff was required to and did perform his duties without in any manner warning plaintiff of said dangerous conditions or used reasonable care in constructing barriers across and under said structure so as to prevent the same from being used by plaintiff as was previously customary.

XIII.

That previous to the injury to plaintiff, and previous to the throwing down upon him of said heavy stick of timber, said gang of men under the directions and orders of said defendant threw down four or five other planks or timbers, the same striking the ground close to the place where said stick of timber struck the plaintiff, and the work and the throwing down of said lumber and timber previous to the injury to plaintiff was well known, ordered to be done, and performed under the direction of said defendant, well knowing that the doing of said acts would cause said passageway to be unsafe to plaintiff and to others who were required to use the same in the performance of their duties in pursuance to the custom and usage previously existing and carried on.

XIV.

That the said piece of timber being thrown down upon the head of plaintiff, as aforesaid, by defendant, carelessly and negligently, struck plaintiff upon his head, causing a very severe laceration, causing a fracture of the skull bone, which caused him to be unconscious for some time immediately thereafter, and causes constant and extreme pains in the back of his neck, headache, dizziness and extreme nervousness, causing impairment of his sight, and a complete

and [6] extreme shock to his nervous system, and extreme physical weakness and lack of power and strength.

Over the occipitoparietal bones there is a scar about two and a half inches long with a slight depression of the bone, giving evidence of a probable fracture of the skull at that point. The inner table being depressed so as to impinge the membranes of the brain, keeping up a constant irritation of the nerve centers. The pupillary reflex is below normal and his sight very much impaired. Hearing is below normal. Pressure all along the cervical vertebra; there is evidence of irritation with intense pain, said pain being constant. The patellar reflex is exaggerated, ankle-clonus normal. The triceps or "el-bone jerk" little exaggerated. There is pain in sacral region upon deep pressure.

His condition is that of a neurasthenic, with extreme weakness of the nerve centers, as a result of which they become less tolerant of external impressions, with loss of co-organization, fatigue and disordered mental state.

Under the best possible conditions he will not improve in many months or be able to follow his usual avocation. If improvement does not take place soon, it will be necessary for him to undergo an operation to raise the bone to relieve the pressure upon the brain before he can fully recover. His case is a very doubtful one so far as complete recovery is concerned under any circumstances.

XV.

That plaintiff is informed and believes, and there-

fore states to be a fact, that his condition is permanent. That he remained in the hospital at Palouse, Washington, for a period of two months, and for sixteen days in the hospital at Spokane, suffering extreme and excruciating pain, and has continued to suffer said pain and weakness ever since. That he is informed and believes, and therefore states to be a [7] fact, that his spinal cord extending down the back of the neck from the base of the brain is greatly shocked and injured, which is permanent.

XVI.

That by reason of the *careless* and negligence of defendant, its agents and servants, as hereinbefore pleaded, and the injuries received by plaintiff, the pain, suffering and physical condition caused by said injuries, and said negligence plaintiff has been damaged in the sum of Twenty Thousand Dollars (\$20,000.00), no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the above-named defendant for the sum of Twenty Thousand Dollars (\$20,000.00), and his costs and disbursements herein.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff. [8]

State of Washington,
County of Spokane,—ss.

M. C. Wood, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true, as he verily believes.

(Signed) M. C. WOOD.

Subscribed and sworn to before me this 22d day of September, 1912.

[Seal] (Signed) W. H. PLUMMER,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Complaint. Filed in the U. S. District Court for the Eastern District of Washington, October 24, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy. [9]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant in the above-entitled action, and for answer to the complaint of plaintiff herein alleges:

I.

Admits paragraphs 1 and 2 of said complaint to be true.

II.

Defendant denies each and every other allegation, matter and thing contained in said complaint, whether as therein stated or otherwise, except it admits that at the time and place stated, plaintiff was

in some manner injured while in the employ of the defendant, but states that it has not sufficient knowledge or information to form a belief as to the nature and extent of said injuries.

FOR A FIRST AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. That plaintiff's injuries, if any, were caused solely and alone by his own carelessness and negligence in failing to take proper precaution for his own safety, and in going into a place of danger, where there was no necessity for him to be, with full knowledge of such dangers. [10]

FOR A SECOND AND AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. Plaintiff, in undertaking the work, in which he was then and there engaged, assumed and took upon himself all dangers and risks, incident to the work, in which he was employed, including the dangers and risks of being struck by pieces of boards or timber, which were being thrown to the ground by the men working upon the platform above him, and that he had full knowledge and notice of all such risks and dangers.

FOR A THIRD AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. That if plaintiff's injuries were in any manner caused or contributed to by the negligence of anyone except himself, the same was caused or contributed to by his fellow-servants, who were then and there

working with or about him and for whose negligence this defendant is not in any manner responsible.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that the defendant have judgment for its costs and disbursements herein.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. [11]

State of Washington,
County of Spokane,—ss.

C. E. Swan, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the Potlatch Lumber Company, a corporation, defendant above named, and makes this affidavit for and on behalf of said Company for the reason and upon the ground that none of the officers of said Company are now within the State of Washington and County of Spokane; that he has read the foregoing answer, knows the contents thereof, and the same is true as he verily believes.

(Signed) C. E. SWAN.

Subscribed and sworn to before me this 13th day of November, 1912.

[Seal] (Signed) G. M. FERRIS,
Notary Public for State of Washington, Residing at
Spokane, Washington.

[Endorsements]: Due service of within answer by receipt of a true copy thereof admitted this 13th day of November, 1912.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

Answer. Filed in the U. S. District Court for the Eastern District of Washington, November 14, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.
[12]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Reply.

Comes now the above-named plaintiff and replying to the affirmative matter pleaded in defendant's answer:

I.

Denies each and every fact, matter and thing contained in defendant's "FIRST AFFIRMATIVE ANSWER AND DEFENSE" to plaintiff's alleged cause of action.

II.

Denies each and every fact, matter and thing contained in defendant's "SECOND AFFIRMATIVE ANSWER AND DEFENSE" to plaintiff's alleged cause of action.

III.

Denies each and every fact, matter and thing contained in defendant's "THIRD AFFIRMATIVE ANSWER AND DEFENSE" to plaintiff's alleged cause of action.

IV.

And denies each and every fact, matter and thing alleged in said answer not expressly hereinbefore admitted to be true in plaintiff's complaint.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff. [13]

State of Washington,
County of Spokane,—ss.

W. H. Plummer, being first duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action; that he makes this verification on behalf of plaintiff for the reason that said plaintiff is temporarily outside of the State. That he has read the foregoing reply, knows the contents thereof, and that the same is true, as he verily believes.

(Signed) W. H. PLUMMER.

Subscribed and sworn to before me this 19th day of November, 1912.

[Seal]

(Signed) GERTRUDE KENDRICK,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Service admitted this 20th day of November, 1912.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Reply. Filed in the U. S. District Court for the Eastern District of Washington, February 6, 1913.
W. H. Hare, Clerk. By Frank C. Nash, Deputy.
[14]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Cor-
poration,

Defendant.

Verdict.

We, the jury in the above-entitled case, find for the plaintiff and assess the amount of his damages at the sum of Five Thousand (\$5,000.00) Dollars.

(Signed) R. A. GROVES,

Foreman.

[Endorsements]: Verdict. Filed in the U. S. District Court for the Eastern District of Washington, April 15, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [15]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Judgment.

This cause coming on for trial upon the issues raised by the pleadings before the court and a jury sworn to try the cause in due form, on the 14th day of April, 1913, the above-named plaintiff appearing in person and by W. H. Plummer, his attorney, and defendant appearing by Cannon, Ferris & Swan, its attorneys, and after hearing all the evidence in said cause and the instructions of the Court the jury retired to consider their verdict, and on, to wit, the 15th day of April, 1913, returned their verdict into court in favor of plaintiff and against defendant, awarding plaintiff damages in the sum of Five Thousand (\$5,000.00) Dollars, and the Court being fully advised in the premises and upon the verdict of said jury and the law and evidence in said cause

It is hereby ORDERED and ADJUDGED: That plaintiff, M. C. Wood, do have and recover of and from the above-named defendant the Potlatch Lumber Company, the sum of Five Thousand (\$5,000.00) Dollars, and his costs and disbursements herein.

Done in open court this 16th day of April, 1913.

(Signed) FRANK H. RUDKIN,
Judge. [16]

[Endorsements]: Service admitted this 16th day of April, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Judgment. Filed in the U. S. District Court for the Eastern District of Washington, April 16, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.
[17]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Motion for Judgment Non Obstante Veredicto.

Comes now the above-named defendant and moves and prays the Court for an order granting to it judgment in its favor, and against the plaintiff herein, notwithstanding the verdict rendered in favor of the plaintiff and against the defendant on a former day of the present term of this court, to wit, on the 15th day of April, 1913, because there is no substantial evidence to authorize or justify said verdict or judgment thereon in behalf of plaintiff and against this defendant for the reason that the testimony in said cause fails to show that the defendant was guilty of any negligence whatever in the premises, and that it was in any way the proximate cause of plaintiff's injury; that the evidence introduced upon the trial of said cause shows that the dangers and risks incident to doing the work, in which the plaintiff was engaged at the time of the accident, were open and obvious and of such character that the plaintiff assumed the same as a matter of law; that the evidence introduced upon the trial of said cause showed that the plaintiff was guilty of contributory

negligence as a matter of law in passing under the conveyor or platform upon which the men were at work throwing down timbers, without first ascertaining [18] whether or not it was safe for him to do so. That the evidence introduced upon the trial of said cause shows conclusively that at the time said timbers were thrown down by the men working upon the platform or conveyor, a warning was given to plaintiff and others on the ground below that said timbers would be thrown down and to look out. That the evidence introduced upon the trial of said cause shows conclusively that if plaintiff's injury was caused by and through the negligence of anyone other than himself, that it was caused by and through the negligence of his fellow-servant R. C. Finnell, for whose negligence the defendant is in no way responsible. That the evidence shows conclusively that plaintiff was at all times fully aware of the fact that the men were at work upon the conveyor or platform and that he had the same knowledge, or means of knowing, that said men were about to throw or would throw down timbers *as* the defendant, and that therefore he assumed any and all risks incident in passing under said conveyor or platform while the men were working thereon. That the evidence fails to show that the defendant or anyone acting for it in the capacity of a vice-principal had any knowledge or notice that the timbers were thrown, or about to be thrown, to the ground by the fellow-servants of plaintiff working upon the conveyor or platform, but, on the contrary, the evidence conclusively shows that the defendant and its officers and agents other than the plaintiff's fellow-servants who threw down

the said timbers had no such knowledge or notice and no reason to anticipate that said timbers' would be so thrown; that upon the whole of the testimony introduced in said cause the defendant is entitled to the entry of judgment in its favor.

This motion is made and based upon the records and files in said cause, the minutes of the court and the stenographic report of the evidence upon the trial of said cause. [19]

In the event this motion is denied, and not otherwise, then the defendant prays the Court to hear and consider its petition for a new trial to be hereafter served and filed herein.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsements]: Due service of within motion by receipt of a true copy thereof admitted this 16th day of April, 1913. Motion for Judgment *Non Obstante Veredicto*. Filed in the U. S. District Court for the Eastern District of Washington, April 16, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [20]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

Stipulation [Waiving Want of Power in Court to Grant Motion for Judgment Non Obstante Verdicto etc.].

THAT WHEREAS, two trials before the Court and a jury have been had in the above-entitled cause, the first resulting in a dismissal of said action by the Court, and the second resulting in a verdict awarding plaintiff the sum of Five Thousand (\$5,000.00) Dollars damages on which verdict judgment has been entered; that prior to the submission of the case to the jury the defendant moved for a directed verdict in its favor; that after the verdict was rendered defendant filed and served a Motion for a New Trial and also for judgment *non obstante veredicto* upon the grounds that the defendant upon the undisputed testimony is not liable, for the reason that the injuries to plaintiff were not caused by any negligence of the defendant, but on account of the plaintiff's own negligence and because of the negligence of a fellow-servant; and

WHEREAS, after the making of said motions and before the hearing thereof, the United States Supreme Court in effect held that this court had no power to grant judgment *non obstante veredicto*; and

WHEREAS, said motions are now pending and undetermined and it is desired by all the parties hereto that the necessity of going through another trial be avoided; [21]

IT IS THEREFORE STIPULATED AND AGREED by and between the parties hereto that the want of power in said court under the law to grant said motion for judgment *non obstante veredicto* is

waived by the parties hereto and the power conceded to the court.

That in the event this court shall render judgment herein for the defendant and should said judgment be reversed by the Circuit Court of Appeals, the original judgment which has been entered in this cause in favor of the plaintiff in the sum of Five Thousand (\$5,000.00) Dollars shall be reinstated in this court.

Dated this 4th day of October, A. D. 1913.

(Signed) W. H. PLUMMER,

Attorney for Plaintiff.

(Signed) CANNON, FERRIS & SWAN,

Attorneys for Defendant.

[Endorsements]: Stipulation Waiving Want of Power of Court to Grant Motion for Judgment Notwithstanding the Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, October 4, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [22]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. E. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Opinion.

W. H. PLUMMER, for Plaintiff.

CANNON, FERRIS & SWAN, for Defendant.

RUDKIN, District Judge.—This action has been twice tried. On the first trial the Court directed a nonsuit at the close of the plaintiff's testimony on the ground that the only negligence shown was that of a fellow-servant of the plaintiff. The action was recommenced, and at the second trial the testimony did not differ materially from that offered at the former trial, but in order to end the controversy the Court denied a motion for a nonsuit at the close of the plaintiff's testimony and a motion for a directed verdict at the close of all the testimony, and submitted the case to the jury, believing at the time that it might later direct a judgment for the defendant, notwithstanding the verdict, in conformity with the local practice, if it concluded that there was no substantial testimony to sustain the verdict. Since the trial the Supreme Court of the United States has decided that a Federal Court may not grant such a motion, but the parties here have stipulated that if the Court is of opinion that there is no testimony to support the verdict, an order of dismissal shall be entered in lieu of an order [23] granting a new trial, and it is believed that this stipulation amounts to a waiver of the constitutional right to have the question of fact submitted to another jury and empowers the Court to do what it could not otherwise accomplish. There is no conflict in the testimony and the material facts are as follows:

The defendant owns and operates a sawmill plant at the town of Potlatch in the State of Idaho. A conveyer leads from the mill to a burner situate about one hundred and twenty-five feet distant from the mill in which waste and refuse matter is carried from the mill to the burner and consumed. This conveyer leaves the mill about four feet above the ground and enters or connects with the burner at a height of forty-five or fifty feet from the ground. The conveyer has a railing and footwalk on either side, is about eight or ten feet in width, and is supported by wooden bents sixteen feet apart. At the time the plaintiff received the injuries complained of, the mill was closed down for repairs. About three days before the accident three workmen were directed by the superintendent or millwright to make certain repairs on a sprocket-wheel at the end of the conveyer next to the burner. To accomplish this work it became necessary to erect a scaffold, and for that purpose a number of timbers, estimated by one of the witnesses at from six to ten, were carried up from the mill over the conveyer to the burner. After the repairs on the sprocket-wheel were completed these timbers were taken down and carried back down the conveyer to a point about twenty-five feet from the burner and perhaps thirty feet above the ground. During this same period of three days the plaintiff and another crew of workmen were engaged in making certain repairs within the burner, the plaintiff mixing the mortar which was used for that [24] purpose on the outside of the burner. On the morning of the accident the plaintiff found it necessary to

go from his place of work to the boiler or engine-room in search of lime, and in so doing passed under the conveyer between two of the supporting bents at a point about twenty-five or thirty feet distant from the burner and directly beneath the scaffolding timbers above. On his return one of the men engaged in making the repairs on the sprocket-wheel threw one of the timbers which had been removed from the scaffold to the ground below, striking the plaintiff and caused severe and permanent injuries to his head. For the injuries thus received a recovery of damages is sought in this action. It may be further stated that one of the men making the repairs in the burner was in charge of the crew there employed, and one of the men engaged in making the repairs on the sprocket-wheel was in like charge. These two men are referred to in the testimony as straw bosses, and it was the man in charge above who threw the stick of timber that caused the injury.

On the foregoing facts the jury returned a verdict in favor of the plaintiff in the sum of five thousand dollars, and the sufficiency of the testimony to support a verdict in that or any other sum in favor of the plaintiff is the only question before the Court for consideration at this time.

Of course, it is an elementary rule of law that the master must provide a reasonably safe place for the servant and reasonably safe instrumentalities with which to perform his work, and must exercise reasonable care to maintain the working place and instrumentalities in a reasonably safe condition. It is likewise an elementary rule of the common law that the

master is not liable in damages for injuries inflicted upon a servant through the negligence of a fellow-servant, and this rule of the common law prevails [25] in the State of Idaho and is enforced by the Federal Courts in all its rigor. I utterly fail to see wherein the master has violated the first rule in this case or how the injured servant can escape the consequences of the second. The act of bringing up or taking down the few timbers used in the scaffold was a mere incident or detail of the work in which the servants were engaged, and the mode of doing this might well be left to the servants themselves, without direction or supervision on the part of the master, unless we are prepared to hold that the master must supervise and superintend every detail of the work and every act of his servant in the course of their employment. That the offending workman and the injured workman were fellow-servants in this case and that no liability on the part of the master exists it seems to me is fully established by the following authorities among scores of others that might be cited:

Central Rd. Company vs. Keegan, 160 U. S. 259.

Alaska Mining Co. vs. Whelan, 168 U. S. 86.

Hermann vs. Port Blakely Mill Co., 71 Fed. 853.

Donnelly vs. San Francisco Bridge Co. (Cal.),
49 Pac. 359.

The jury have found that the plaintiff was injured without fault on his part, and it may well be that the law should afford him compensation, but his rights are measured by the laws of the State of Idaho where he was employed and where he received his injuries,

and in the administration and enforcement of these laws this Court has no discretion.

Under the stipulation of the parties the judgment heretofore entered should be vacated and set aside and the action dismissed, and it is so ordered.

[Endorsements]: Opinion. Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [26]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

**Order [Sustaining Motion for Judgment Notwith-
standing the Verdict, etc.]**

This cause coming on to be heard before the Court on defendant's motion for judgment notwithstanding the verdict of the jury, and the record and files in this cause, and after considering said motion:

It is hereby ORDERED: That said motion be, and the same is hereby sustained and the verdict of the jury and judgment entered thereon is hereby vacated and set aside, and defendant do have and recover judgment against plaintiff that this cause be dismissed and defendant recovers costs herein, to all

and each of which plaintiff excepts, and his exception is allowed.

It is further ORDERED: That plaintiff have thirty (30) days from the date hereof in which to serve and file his proposed bill of exceptions and statement of facts.

Done in open court this 11th day of October, 1913.

(Signed) FRANK H. RUDKIN,

Judge. -

O. K.—(Signed) E. J. CANNON.

[Endorsements]: Order and Judgment Granting Defendant's Motion for Judgment Notwithstanding the Verdict, and Order Extending Time of Plaintiff to Prepare His Proposed Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, Oct. 11, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [27]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

**Notice of Filing of Plaintiff's Proposed Bill of
Exceptions.**

To the Above-named Defendant, and to Cannon,
Ferris & Swan, Attorneys:

The plaintiff in the above-entitled cause herewith delivers and serves upon you his proposed Bill of Exceptions which he will deliver to the Clerk of the above-entitled court, as provided by law, for the purpose of having the same delivered to the Hon. Frank H. Rudkin, Judge of the above-entitled court and the Judge who tried said cause, for the purpose of, in due time, having the same certified as the correct Bill of Exceptions taken, made and had in said cause and to be made a part of the record herein, the same to be used by plaintiff upon Writ of Error to the Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

Service of the within notice and Said Proposed Bill of Exceptions is hereby admitted this 16th day of October, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. [28]

[Endorsements]: Notice of Filing Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, October 16, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [29]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Divi-
sion.*

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Cor-
poration,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 16th day of April, 1913, the above-entitled cause came on for trial before the above Court and a jury duly impanelled, the Hon. Frank H. Rudkin presiding, plaintiff appearing by his attorney, W. H. Plummer, and the defendant appearing by its attorneys, Cannon, Ferris & Swan, the following proceedings were had. Mr. Plummer made his opening statement to the jury, the opening statement of the defendant being reserved, whereupon the following evidence was adduced on the part of the plaintiff.

[Testimony of Alexis E. Albert, for Plaintiff.]

Testimony of ALEXIS E. ALBERT, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct Examination.

My name is Alexis E. Albert. In September, 1911, at the time of the happening of the injury to the plaintiff [30] complained of in this cause, I was working for the Potlatch Lumber Company, the de-

(Testimony of Alexis E. Albert.)

fendant herein, at Potlatch, Idaho. The company owned and operated a large sawmilling plant and for that purpose owned and operated a structure and appliance known as a conveyer. In describing the conveyer and structure I will say that the conveyer is used for the purpose of conveying refuse material from the sawmill proper out of and away from said mill and placed in a receptacle built of brick and mortar called a burner, where said refuse material is burned up. Said conveyer is about 125 feet in length and at the mill end of it it is about 4 feet above the ground and extends outward and upward in an incline floor up to the burner, at which point it is about 45 feet in height from the ground. This conveyer is composed of an endless chain apparatus which runs over a sprocket upon the burner end thereof, something upon the principle of the old style straw-stacker of a threshing machine, the endless chain running in a sort of trough and by the chain being operated over and around both ends of said conveyer the refuse material is transported outward and upward and dumped over into the burner where it is destroyed. Alongside of this conveyer an incline upward about the same grade as the conveyer itself is a structure or platform which is somewhat wider than the conveyer itself and extends the full length thereof, so that workmen can work on either side of said conveyer and have a walkway for that purpose, the whole structure being about 10 feet in width. The structure is erected upon timbers or bents, or what might be termed trestles; that is, the

(Testimony of Alexis E. Albert.)

same is supported in this incline position along said conveyer by framework of [31] timbers built at different intervals along the ground under and supporting the structure and conveyer. The defendant worked in the operation of its milling plant over 500 or 600 or 800 men. (Here the witness describes on a blackboard by using chalk the general situation of the conveyer, burner and immediate vicinity.) In showing incline or decline or whatever it is, I will say that this is called the burner here and this is the incline. I will mark the burner "B" and the incline "I" and "M" for the mill. This structure is supported by posts, and these posts come down to the level of the ground. At the burner the floor of the structure supporting the conveyer is between 35 and 40 feet from the ground. I saw the accident. At the point under the structure near where the plaintiff was hurt it was about 25 or 30 feet from the burner at the place where I make a cross on the board. I was working on the top of the conveyer when the accident occurred. There was working with me Mr. Robert Fennell and another man we called "Shorty." Mr. Hibbard sent all of us men to work up there. He, Hibbard, was the head millwright; he did not have personal charge of the work there; Mr. Fennell had personal charge of the work being done by "Shorty" and me upon the conveyer. Just before the accident happened I was working upon the conveyer up above where Mr. Wood was injured. There was a brick on either side of the conveyer and I was standing on these working at the time of the accident. The whole conveyer was about 10 feet wide; the dis-

(Testimony of Alexis E. Albert.)

tance from where Fennell stood on the conveyer down to the ground was about 30 or 35 feet. This space underneath the conveyer, that is this space between the supports or bents was used generally for teams to drive through and for people to pass through in doing the work [32] in and about the milling plant. The place was used generally as a regular thoroughfare for the men to go back and forth to their work; the same had been used as described all the time I worked there. Just immediately before the accident happened we had fixed a sprocket-wheel that we were working on. The sprocket-wheel was situated at the end of the conveyer right near the burner. We had hauled some timbers up to build a scaffold. These timbers were taken from the ground down below and conveyed by the conveyer up to the burner, where we took them off and built a scaffold so as to be up high enough to put in a new sheave-wheel, and just before the accident happened we had completed this work and was tearing the scaffold down, and under instructions from Mr. Fennell I was taking the scaffold apart, and the different timbers and lumber was put in the conveyer, where it was conveyed down to the point on the conveyer up over the place where Mr. Wood was injured. The distance we took the lumber down where the scaffold had been built was about 25 or 35 feet. There were six or ten large pieces of timber that we placed on the conveyer platform under orders of Fennell, from which point they were afterwards thrown down upon the ground. I had not thrown any pieces down on

(Testimony of Alexis E. Albert.)

the ground myself, but Fennell and the other man had thrown down about six or eight pieces. The piece that struck Mr. Wood was about eight feet long and six inches by eight inches in thickness and width. The pieces that were thrown down upon the ground before the one was thrown that hurt Mr. Wood were thrown down about five minutes before Mr. Wood got hurt; that is, before the one which hurt Mr. Wood was thrown down. I did not see the timber strike but afterwards I saw [33] Mr. Wood lying on the ground on his face; his head was bleeding. I did not go down there at all; kept right on working as others had gone down there to help Mr. Wood. There was no reason why the timbers could not have been continued down upon the conveyer to the ground the same as they had been brought up, and the timbers were being thrown over the side by the orders of Mr. Fennell who was in charge of the work. Fennell himself threw down the one that struck Mr. Wood. There was no one stationed down on the ground to warn anyone of the throwing down of said timbers and no barrier or other warnings were placed in front of or near the place where it was customary for men and teams to walk in going to and performing their work. No warning of any kind was posted or given except when the men would throw down a piece of wood they would sometimes holler. I think I heard one man holler once, but I don't know which one it was. I didn't see Mr. Wood when he passed underneath the structure and did not see him until he was hurt. The kind of work we were doing,

(Testimony of Alexis E. Albert.)

as I said before, before this accident, and for which we used the scaffolding, was the taking out of an old sprocket-wheel and putting in a new sheave-wheel. These were repairs being made by us to the conveyer. The endless chain would run over the sprocket-wheel which was situated at the end of the conveyer right close to the burner; the sprocket-wheel is a wheel with teeth and an endless chain goes right over that, and the turning of the sprocket-wheel makes the chain move and convey the materials to the burner.

Cross-examination by Mr. CANNON. [34]

Mr. Fennell was boss over me and these other men that were working there; that is, over me and another man, while we were working up there on the conveyer. His boss was Mr. Hibbard, who was the general millwright in charge; his boss was the Superintendent of the company; Mr. Seymour; Mr. Seymour's boss was Mr. Laird. Mr. Laird would give his instructions to the superintendent, the superintendent would give the instructions to the foreman, and the foreman would give instructions to the men working under him, and while I was up there working with the other men Mr. Fennell told us two men what to do. The conveyer was about four feet from the ground when it started from the mill and it inclines up higher as it goes out to the burner until it gets to be 45 or 50 feet high. The conveyer is for the purpose of taking away the waste from the mill and burning it up. The burner is about 30 or 35 feet in diameter. I don't know all of the things that the

(Testimony of Alexis E. Albert.)

men would have to pass under this conveyer structure for, but they would pass under it from time to time in going about their work, and specially when the whistle would blow the men would all come out of the mill and go through underneath the conveyer this way because it was the shortest. There was no board walk to walk on through there; the whole structure underneath was open. We were repairing the conveyer at the burner end of it. We worked on this job about three days. I knew Mr. Wood as I had worked with him before. He was working under a boss by the name of Mr. Nelson. He and Nelson were working for some days doing mason work, repairing the burner itself, using lime, brick and like materials. He, Wood, had nothing to do with the work we were doing. We took our directions from [35] Fennell. Mr. Wood was helping Mr. Nelson and his crew in building a brick foundation for the burner. He had been working down below on the ground going back and forth and doing general work helping fix the burner for two or three days. I saw him occasionally from time to time during the three days I worked upon the conveyer and if he had looked up he could have seen me. There was obstructions between the drum and the mill underneath the conveyer to prevent him from going around by the drum; the obstructions consisted of old grates that came out of the burner and also some bricks that had been hauled out there in wheelbarrows. Pieces had been thrown down before the one was thrown down which hit Mr. Wood; quite a number of them. I do not know exactly but five or six.

(Testimony of Alexis E. Albert.)

Q. Did you hear anybody yell when they were being thrown down? A. Yes, sir.

Q. What would they yell, "Look out," or what?

A. "Look out below."

Q. Who would call it—was it the fellow that would throw them out, or the other fellow below—the fellow that was up above would holler out "Look out below"?

A. Yes, sir, that is the man. I was engaged in my own work and not throwing any down myself, and I didn't pay much attention to that excepting I heard them holler; I don't know that I heard them holler more than once or not. ~~Those timbers were being thrown down by orders of Mr. Fennell, the foreman.~~

Redirect Examination by Mr. PLUMMER. [36]

We were working up close to the burner a short time before the accident and when we got through there we were supposed to take our lumber and throw it down on the ground. This was Fennell's orders. We were not working three days right above and over the place where Wood was hurt but were working up near the burner a distance of 25 or 30 feet from where the timbers were afterwards thrown down on the ground. Fennell and "Shorty" were only at the place on the conveyer above and over which Wood was walking at the time of his injury just a few minutes before he was hurt. In fixing this sprocket-wheel the sprocket-wheel was up near the burner and we worked there three days until we got through working on this scaffold and then we tore the scaffold down and brought the lumber down to the place where it was afterwards thrown over the other side down

(Testimony of Alexis E. Albert.)

upon the ground. I had been working for the Potlatch Lumber Company about eight months around this mill before this accident occurred. The gates and piles of brick that I spoke of were obstructing the other means of going under the conveyor. In going from place to place about said mill were large grates about four or six feet long and about eighteen inches wide at one end and twelve at the other. I do not know how many were piled up but a good many. They made too big a pile for any body to walk over. The bricks were a number of wheelbarrow loads but I do not know just how many. The bricks and old grates had been there two or three days.

[Testimony of R. C. Finnell, for Plaintiff.]

R. C. FINNELL, being sworn on behalf of plaintiff, testified as follows:

Direct Examination by Mr. PLUMMER. [37]

On September 21st, 1911, when Mr. Wood was hurt I was employed and working for the Potlatch Lumber Company at Potlatch, Idaho. I was the boss in the immediate charge of the men fixing the sprocket-wheel at the end of the conveyer. Mr. Charlie Hibbard, the foreman of the mill, sent me up there and told me to take charge of these men and do this work. He, Charlie Hibbard, the mill foreman, had charge of everything around there. Hibbard told me to go up to the top of the burner and remove a sprocket-wheel in the end of the conveyer and put in a sheave in its place. Hibbard did not give me any other instructions. In order to do this work it was necessary to take some lumber up there from the yard to the top

(Testimony of R. C. Finnell.)

of the conveyer and there build a scaffold and afterwards to replace the lumber down on the ground. This was all left for me to do and to have charge of.

Cross-examination by Mr. CANNON.

I am employed now at La Grande, Oregon, with the Palmer Lumber Company. I am not now in the employ of the Potlatch Lumber Company. It has been nine months since I was in the employ of the Potlatch Lumber Company. Mr. Hibbard was my boss and I went up there to repair the conveyer. This conveyer, I should judge, was about 120 to 130 feet in length. That is, from the mill to the burner. I had been working for the Potlatch Lumber Company about three years before this accident, and we had been working on the conveyer up there near the burner for about three days before the accident. The conveyer where it came in contact with the burner was about between 40 and 50 feet from the ground. The [38] conveyer is supported by trestles which are ten by ten from the ground; that is, ten inches by ten inches. We sometimes called them bents. These bents were sixteen feet apart. I had two men under me at the time. I said that Hibbard was my immediate superior. Nelson was not my foreman or over me in any way. Hibbard was Nelson's superior; Nelson himself was one of the bosses. I knew a man there by the name of Mr. Seymour; he was the superintendent over Mr. Hibbard.

Witness excused.

[Testimony of M. C. Wood, in His Own Behalf.]

M. C. WOOD, plaintiff, called on his own behalf after being sworn testified as follows:

Direct Examination.

I am the plaintiff in this case. On the 21st day of September, 1911, I was working for the Potlatch Lumber Company. Had been working for that company about three years. I first worked at Boville in the woods and then afterwards at Palouse at the mill there and then at Potlatch. I had been working at Potlatch around the mill about two years and a half before my injury. Some time previous to my injury I had been working around the mill sweeping and cleaning up and on Sundays I would look after the burner and help clean it out and of course regulate the drafts during the week, keeping the drafts regulated and attending to the burner generally. I was getting \$2.50 a day. On September 21st, 1911, I was injured. I feel the result of the injury ever since. I do not remember of getting hit as I was knocked unconscious and remained unconscious for [39] a number of days. On the day I was hurt I was working in and about the burner repairing it, mixing mortar and helping the brick mason. Just before I was hit I had been mixing mortar and I discovered there was no lime and in the performance of my duty I went to the boiler-room to get some so as to mix in the mortar. In describing where the boiler-room is with reference to where I had to use the lime I will say, now the engine-room and boiler-room runs along this way (illustrating). I was mix-

(Testimony of M. C. Wood.)

ing mortar over near the burner on one side of the conveyer and the boiler-room is on the opposite side of the conveyer, necessitating my going under the conveyer in order to get to the boiler-room. I make two X's on the board showing the boiler-room. As I passed under this conveyer and went under the post here and went to the boiler-room to get some lime and after leaving the boiler-room I started back to where I started, passing under the conveyer structure, and that is the last I remember. The last I remember I was walking along the pathway, just leaving the boiler-room going back. The next I remember is when I came to myself in the hospital nine days afterwards. This pathway or space under the conveyer was used as a regular pathway for teams and men in going from one part of the mill grounds to the other. This pathway which was used for teams and men is the one that I travelled over both going to the boiler-room and coming back when I got hit. I will show on the blackboard here where these particular places were in the structure, these particular paths I speak of using for teams. The cross which indicates the place where I got hit is right on the outside from under the conveyer along the same pathway. I will mark the pathway "O". The place where Mr. Albert marked the cross at the place where I got hit. This path was used in addition to teams going [40] back and forth, for people in passing in and about in the performance of their work. As near as I can estimate I would say that fifty people would pass along this path under this structure daily, the same place where I was walking when I got hit.

(Testimony of M. C. Wood.)

Some days there are more than others, that depends on the work. On one side was the boiler-room and engine-room and other buildings, and on the other side was where I was making mortar. This path extends along there and leads to a walkway which leads to the mill. I first came from the mortar-box under the conveyer structure to the boiler-room and then started back over the same path and continued until I got hit. I have passed under this same conveyer structure in the performance of my work at numerous times before the day I was hit. I didn't know there were any men working upon the conveyer structure up there over this pathway; I did know they were working over near the burner fixing the sprocket-wheel which is about 30 or 40 feet closer to the burner than the place where I got hit. I didn't at any time see any men working right over where I was walking. I never heard any warning of any kind given by any body. My hearing was good and I could have heard if any warning had been given sufficient for an ordinary person to hear where I was. Nobody gave me any warning that they were going to throw down any boards or planks of any kind that I heard. I was not making any noise myself. There was nothing to prevent me from hearing if there had been a warning given loud enough for a person to hear. There were no barriers or notices of any kind put up there to warn any body of any danger or prevent them from walking into danger, and there was nothing around there to indicate that it was a dangerous place for me to go.

(Testimony of M. C. Wood.)

Cross-examination by Mr. CANNON. [41]

I had been working for that company for about three years. I was working around looking after that burner and sweeping and cleaning up; that is, looking after the burner when the mill was running. I was not a roustabout. I just looked after the burner. I was not a sort of ready man and did things that I found necessary to do, but in regard to cleaning out the burner I tended to that as I was used to that work there. I was the oldest man on that part of the work and knew most about it. I was familiar with the burner there and familiar with the conveyer; perhaps as familiar as any body else around the mill.

Q. And you knew the conditions all around there, didn't you?

A. Well, I knowed part of them, I don't say that I knowed all. I knew something about the length of the conveyer. I don't know positive just the length of it. It might have been about 100 feet or something like that and at the burner about 45 or 50 feet high, and the place where I was hurt about 35 or 40 feet, then it run down slanting like to the mill where it run pretty close to the ground. The conveyer structure must have been about 8 or 10 feet wide, I am not positive. The nearest bent that supported the conveyer was about 30 or 40 feet from the boiler-room. The conveyer structure was right in front of me as I went out of the boiler-room and I could look up and see it. I had to walk about 30 feet before I got to it. These men had been working up at the end of the conveyer near the burner about three days. I saw them from time to time working up there at the

(Testimony of M. C. Wood.)

sprocket at the end of the chain. On [42] the day I was hurt I don't remember whether I looked up to see whether they were there yet or not. I didn't pay any attention to them. I should say there were 6 or 7 bents between the ends of the conveyer and the mill and a team could drive between any of them, I guess, I don't know. Teams would go under these places between these bents in performing general work around the mill there, especially the roustabout team. It was his general pathway around there cleaning up around the burner. When I say it was used customarily and regularly for teams I mean the teams would pass under there in going about the mill grounds, it being a regular roadway for that purpose, and for taking up waste and stuff thrown away, and it was handy for him, ~~other teams~~ to pass through there. The work the teams would have to do around the mill would be hauling supplies in and out and passing in and out to haul stuff from one place to another where it belonged, which included grates, brick and lime, and one thing and another that they needed in fixing the burner. I didn't mean that teams would drive along through these places as they would drive on Riverside Avenue, but once in a while a team would go through there and men would also go through there in going about their work. They went through quite often. There was quite a few men working there. I could not tell how many. Before the time of my injury during the time that I had been working at the mill I often worked with Mr. Finnell in and about the mill. During that work he was over me; that is, he was my boss. I was not in

(Testimony of M. C. Wood.)

his crew the day of the injury, but before that time in working around the mill Finnell was my boss when the ~~general~~ foreman was away. I done what Mr. Finnell gave orders [43] to do. The day I was hurt I did not stay in the boiler-room but two or three minutes. I was one of the oldest men working around there tending to the burner and had been doing other work before that time. This conveyer was for the purpose of carrying stuff up to where it would be burned. It had a solid floor so that nothing would drop down through the conveyer structure. There was a walkway on each side of it and a floor underneath and the same was operated so that the conveyer would carry stuff up to the burner, a good deal like some of those old style threshing machines carrying grain up to the stack. This conveyer carried stuff to the burner from the mill, that is, waste and rubbish, pieces of wood and the like.

Redirect Examination by Mr. PLUMMER.

Q. Was there anything there that you know of to prevent these timbers and planks being carried down to the ground from the point where they had been used as a scaffold by means of the conveyer the same way they were carried up?

A. There was not. They could have carried them down on that incline, that is the conveyer, the same as they were carried up.

There was a walkway up and down each side. The timbers were all carried up by the conveyer and they could have been carried down just the same.

When I woke up in the hospital I was suffering intense pain in my head and I have been unable to do

(Testimony of M. C. Wood.)

any work since the time of my injury. There is a terrible pain in my [44] head all the time and frequently I get awful dizzy and weak. I have lost fully twenty pounds of flesh and am unable to do anything requiring physical exertion. My head was cut and the inside of my skull injured in some way. I am forty-two years old.

[Testimony of R. C. Finnell (Recalled).]

R. C. FINNELL, being recalled as a witness on behalf of plaintiff, testified as follows:

(By Mr. PLUMMER.)

It was only a few seconds after Mr. Wood was hit until I got to him. He had been picked up before I could get to him. I saw his head had been mashed and blood on his head here. (Indicating.) I don't know exactly where he was standing when he was struck but when he had fallen and was lying on the ground he was about twenty-four feet from the conveyer or something like that. He appeared to be lying after he was struck about twenty or twenty-four feet this side of the conveyer. That is, on the side of the conveyer furthest away from the boiler-room. I threw the stick down that must have struck him. I never saw him there at all until after he was hit. There was nothing to prevent me from replacing these timbers on the ground down below by using the conveyer or by letting the same down with ropes, or by throwing the same down at some other point. The pieces were being thrown down by my orders, but I did not know there was any body down there who

(Testimony of R. C. Finnell.)

would be liable to be hit. Mr. Wood was unconscious when we arrived to where he was.

Witness excused. [45]

[Testimony of Dr. D. L. Smith, for Plaintiff.]

Dr. D. L. SMITH, witness on behalf of plaintiff, after being sworn, testified as follows:

I am a regular physician and surgeon practicing medicine and surgery in the city of Spokane, and have been for a number of years, duly licensed for that purpose. I have treated Mr. Wood, the plaintiff in this case, on numerous occasions and made numerous examinations of his injuries and his physical condition. The injury he sustained caused a fracture of the skull and an injury to the inner membrane or inner table of the skull, and there seems to be a part of the skull pressing down upon the brain. A surgical operation might relieve the situation partly, but such an operation is very dangerous and might cause his death. I do not think I could advise an operation on that account under the circumstances. He is unable to do anything requiring physical exertion. He cannot work and he is constantly suffering pain in his head, all of which condition is permanent.

Witness excused.

Mr. PLUMMER.—Plaintiff rests.

Mr. CANNON.—If the Court please, the defendant now moves the Court to instruct the jury to render a verdict for the defendant and challenges the sufficiency of the evidence to justify any verdict for plaintiff on the grounds.

1. That plaintiff assumed the risk of the injury

which he received. [46]

2. That the negligence, if any, which caused his injury, if any, was the negligence of a fellow-servant of plaintiff, and that his injury was not caused by anyone or anything for which the defendant in this case was responsible or liable.

After argument by counsel for plaintiff and defendant the Court denied the motion, to each and all of which defendant excepted and exception was allowed.

Defendant rests.

Thereafter Mr. Plummer, for plaintiff, and Mr. Cannon, for defendant, argued the case to the jury and thereafter the Court gave the following instructions to the jury:

[Instructions of the Court to the Jury.]

The COURT.—Gentlemen of the jury: There is little or no conflict in the testimony in this case, and if you hear and follow the instructions of the Court I apprehend you will not experience much difficulty in reaching a verdict.

This is an action to recover damages for personal injury and the action is based upon negligence on the part of the defendant. Negligence is defined in law as the doing of that which a reasonably careful and prudent man would not have done under the like circumstances and conditions, or not to do that which a reasonably careful and prudent man would have done under the like circumstances and conditions.

It is the duty of the master to exercise reasonable care, to furnish a reasonably safe place for his ser-

vants and to exercise reasonable care to see that that working place is [47] kept reasonably safe. When the master has done this, he has performed his full duty. He does not guarantee the safety of his servant, and if the servant is injured through the negligence of a fellow-servant or otherwise after the master has exercised that degree of care which the law imputes upon him, the servant must suffer his misfortune in silence.

I further instruct you, gentlemen of the jury, that under the law the master is not liable to one servant for injury received from the negligence of a fellow-servant. In order that you may understand this, suppose a farmer sends two men out in a field to work and one of these men negligently injures the other, the master is not responsible. So, if a contractor puts a crew of men to work on a building and some of these men are working up on a scaffold overhead and some of them are working underneath and one of the men on the scaffold negligently throws a stick of timber down upon one underneath, the master is not liable. These are the ordinary risks incident to the employment which the servant assumes.

The only theory upon which there can be a recovery in this case is that the defendant failed to furnish a reasonably safe place for these persons to work and failed to exercise reasonable care to see that the place was kept safe.

Place yourself in the position of this defendant; suppose you sent three men to repair this burner and sent three men above to repair this sprocket-wheel, would you consider that a reasonably safe place for these men to work, under the circumstances; would

you, as reasonable men, anticipate that one of these men would throw a stick of timber out of this carrier negligently and injure a person below? [48]

The question whether this place was reasonably safe is practically the only question for you to consider; if you, as reasonable men, would have pursued the same course that the defendant did in this case in the exercise of reasonable diligence, then the master is not liable.

If you, in the exercise of reasonable care, would have taken precaution which the master here did not take for the protection of these workmen, then the master is liable to the plaintiff if such failure to exercise care was the direct and proximate cause of the injury.

If you find for the plaintiff in this case, that is by a preponderance of the testimony, it will be incumbent upon you to fix the amount of his recovery. You have heard the testimony bearing upon the nature and extent of his injuries. You will fully compensate him for any pain or suffering he has endured in the past by reason of this injury, and for any pain and suffering he will endure in the future. You will compensate him for any impairment of his earning capacity in the past, resulting from this injury; and for the loss which he will sustain by reason of the impairment to his earning capacity in the future. These things, gentlemen of the jury, will make up your verdict.

The fact that this defendant is a corporation has no bearing, directly or indirectly, upon this case. Its property is as sacred as yours. If it has wronged this plaintiff and has failed to protect him under the

law as it should have protected him, it is liable in damages. If it has exercised that degree of care which the law imputes upon it, it is not liable in damage. It matters not to you [49] whether you approve the fellow-servant doctrine or not. It is the law of the State of Idaho; it is the law which you and I are sworn to support and administer, and it is your duty to accept the instructions of the Court in that regard.

These are all the instructions I deem it necessary to give you, but I will further instruct you that if the person who threw this stick of timber down upon this man, if he did it without warning, was guilty of gross and criminal negligence. I say for that negligence the master is not liable; but if you find that the accident happened through the careless negligence of the master and the fellow-servant, then the master is liable. That is, if he was injured through the failure of the master to furnish a reasonably safe working place, coupled with the act of a fellow-servant in throwing the stick of timber upon him.

I further instruct you that if the master knew that persons were passing to and fro under this place, it was bound to anticipate that the plaintiff might be there or know that some other person might be there. Of course, if it had no reason to anticipate, then it was bound to take no precaution against it.

I have prepared two forms of verdict, one a verdict for the plaintiff and one a verdict for the defendant. In event you find for the defendant, you will simply sign the form so finding; if you find for the plaintiff, you will insert in the blank left in the verdict the amount for which you so find.

I have stated to you that the burden of proof is upon the plaintiff to establish his case by a preponderance [50] of the testimony, that is, the greater weight of the testimony. He must further establish that the defendant was negligent by a preponderance of the testimony, and he must next establish the amount of his damages by a preponderance of the testimony.

You, gentlemen of the jury, are the sole judges of the facts in this case and the credibility of the witnesses.

In arriving at your verdict you will consider all of the testimony and reach such conclusion as the facts will warrant. You may retire, gentlemen of the jury.

Whereupon the jury retired to consider their verdict, and after due deliberation returned into court with their verdict awarding damages to plaintiff in the sum of Five Thousand Dollars (\$5,000.00) against defendant. Whereupon judgment was entered on said verdict in favor of plaintiff and against defendant for the sum of Five Thousand Dollars (\$5,000.00).

Thereafter and within the time allowed by law defendant moved the Court for judgment *non obstante veredicto* and in event said motion was denied; defendant moved the Court to set aside the verdict and grant a new trial. Said motions came on regularly for hearing by virtue of stipulation of the parties heretofore filed in this cause, both parties being present, and the same were argued by counsel for the [51] respective parties; whereupon the Court granted defendant's motion for judgment *non ob-*

stante veredicto, to which ruling plaintiff then and there excepted and his exception was allowed, and now, in the furtherance of justice and that right may be done, the plaintiff presents the foregoing as his Bill of Exceptions in this cause, and prays that the same may be settled and allowed and signed and certified by the Judge as provided by law and the practice of this Honorable Court.

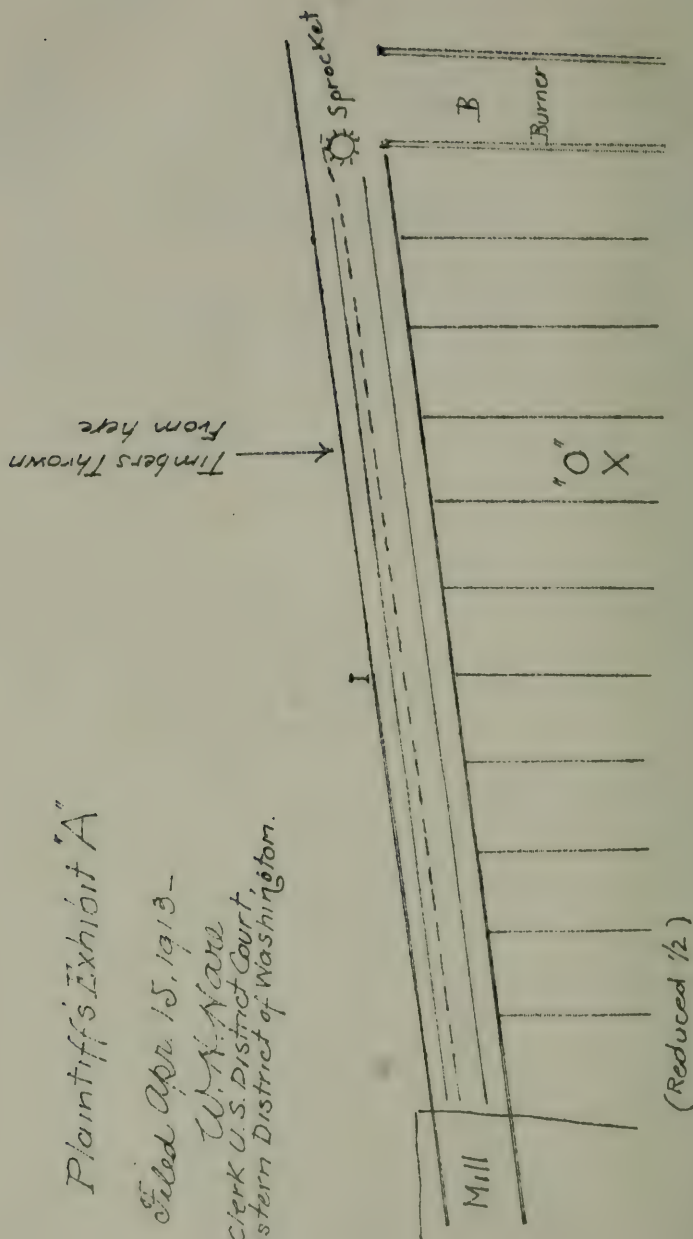
Plaintiff's Exhibit "A," hereto attached, is permitted by the Court to be substituted for the plat made by the witnesses on the court blackboard.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff. [52]

Plaintiff's Exhibit "A"

Filed Apr. 15, 1913 -

W. A. N. A. N.
Clerk U. S. District Court,
Eastern District of Washington.



*In The District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Cor-
poration,

Defendant.

**Certificate and Order Allowing and Settling Bill of
Exceptions.**

This cause coming on duly and regularly for hear-
ing before this Court on this date upon application of
the plaintiff for the settling and certifying of his
proposed Bill of Exceptions lately filed herein, and
the said proposed Bill of Exceptions having been pre-
sented, served and filed within the time allowed by the
Court, and the Court considering said proposed Bill
of Exceptions and being fully advised therein, it is
now

ORDERED: That the foregoing Bill of Excep-
tions be, and the same is hereby approved, allowed
and settled as the true, full and correct Bill of Ex-
ceptions in said cause, containing in narrative form
all of the evidence and proceedings taken and had
upon the trial of said cause and all the exhibits, and
that the same as so settled and allowed be now and
here certified accordingly by the undersigned, Judge
of this court, who presided at the trial of this cause,
and that the Bill of Exceptions when so certified be
filed herein by the clerk. [54]

I hereby certify that the foregoing Bill of Exceptions is fully true and correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court this 25th day of October, 1913.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Bill of Exceptions. Filed Oct. 25, 1913. W. H. Hare, Clerk. By F. C. Nash, Deputy. [55]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Come now the above-named plaintiff, M. C. Wood, and makes and files the following Assignments of Error in said cause, which said plaintiff will rely upon in the United States Circuit Court of Appeals for the Ninth Judicial Circuit for relief from and reversal of the judgment entered in this cause in the court below, to wit:

I.

That the Court erred in sustaining defendant's motion to set aside the verdict heretofore rendered by the jury in said cause in favor of the plaintiff and against defendant, and in vacating and setting aside

the judgment rendered by the Court upon said verdict and granting judgment to defendant notwithstanding the verdict.

II.

That the Court erred in adjudging and ruling that the injury to plaintiff was caused by the negligence of a fellow-servant of plaintiff.

III.

That the Court erred in holding and deciding that defendant is not liable in any manner whatsoever to plaintiff for the injury received by him alleged and pleaded in plaintiff's complaint. [56]

IV.

That the Court erred in holding and deciding that there was no negligence suffered or committed by anyone for which and for whom the defendant was responsible or liable.

V.

The Court erred in vacating and setting aside the judgment in this cause in favor of plaintiff and dismissing the same.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

[Endorsements]: Service admitted this 11th day of October, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Assignments of Error. Filed in the U. S. District Court for the Eastern District of Washington. October 11, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [57]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff, by his attorney, and complains that in the record and proceedings had in said cause and also in the rendition of the judgment in the above-entitled cause in said District Court of the United States, for the Eastern District of Washington, Northern Division, at the September term thereof, 1913, manifest error hath happened to the great damage of this plaintiff.

Your petitioner further respectfully shows that he has this day filed herewith his Assignments of Error committed by the court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this, his suit in error.

WHEREFORE, said plaintiff prays for the allowance of a writ of error to the said District Court, and for an order fixing the amount of bond, and for such other orders and process as may cause the same to be corrected by the United States Circuit Court of

Appeals for the Ninth Judicial Circuit.

Dated this 11th day of October, 1913.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff. [58]

[Endorsements]: Service admitted this 11th day of October, 1913. Further notice of application waived.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Filed in the U. S. District Court for the Eastern District of Washington, October 11, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [59]

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

M. C. Wood, plaintiff, in the above-entitled cause, having this day filed his petition for a writ of error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of error within due time, and also praying that an order be made fixing the amount of

security which the defendant shall give and furnish upon said writ of error.

Now, therefore, it is ORDERED, that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at Two Hundred and Fifty Dollars (\$250.00).

Dated this 11th day of October 1911.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order Allowing Writ of Error and Fixing Amount of Bond on Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, October 11, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [60]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corpo-
ration,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, Greeting:

Because, in the Record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between M. C. Wood, plaintiff in error and the Potlatch Lumber Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said M. C. Wood, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit [61] Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 17th day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United
States, the 11th day of October, in the year of our
Lord one thousand nine hundred and thirteen.

[Seal]

W. H. HARE,
Clerk of the United States District Court, Eastern
District of Washington, Northern Division.

By Frank C. Nash,
Deputy Clerk.

Allowed by:

FRANK H. RUDKIN,
District Judge. [62]

[Endorsed]: In the District Court of the United
States for and Within the Eastern District of Wash-
ington, Northern Division. M. C. Wood, Plaintiff,
vs. The Potlatch Lumber Company, a Corporation,
Defendant. Writ of Error. Filed in the U. S.
District Court, Eastern District of Washington.
Oct. 11, 1913. Wm. H. Hare, Clerk. Frank C. Nash,
Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corpo-
ration,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, M. C. Wood, as principal, and The Title Guaranty & Surety Company, a corporation established under the laws of the commonwealth of Pennsylvania, and having its principal place of business in Scranton, in said commonwealth, as surety, are held and firmly bound unto the Potlatch Lumber Company, a corporation, in the full and just sum of Two Hundred and Fifty (\$250.00) Dollars, to be paid to it, its successors and assigns, for the payment of which well and truly to be made we bind ourselves, and each of us and our and each of our assigns, successors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of October, 1913.

WHEREAS, lately, in the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court between M. C. Wood, as plaintiff, and The Potlatch Lumber Company, a corporation, as defendant, a judgment of dismissal was rendered in favor of said defendant and against plaintiff, and costs of action, and the said plaintiff has obtained from said court a writ of error to reverse said judgment in the [63] aforesaid action and a citation directed to the above-named defendant, citing and admonishing them to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California;

Now, therefore, the condition of this obligation is such, that if the said M. C. Wood shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall remain in full force and effect.

Dated October 11th, 1913.

(Signed) M. C. WOOD,
By W. H. PLUMMER,
His Attorney.

(Signed) THE TITLE GUARANTY &
SURETY COMPANY,

By F. W. DEWART,
Attorney-in-fact,
THOMAS MALONET,
Attorney-in-fact,

[Seal of Corporation Surety Company]

The above and foregoing bond approved this 11th day of October, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bond on Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, October 14, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [64]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Cor-
poration,

Defendant.

Citation.

United States of America,—ss.

The President of the United States to the Potlatch
Lumber Company, a Corporation, and to Can-
non, Ferris & Swan, Your Attorneys, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held at the city of
San Francisco, in the State of California, within
thirty (30) days from the date of this writ, pursuant
to a writ of error filed in the clerk's office of the Dis-
trict Court of the United States, for the Eastern Dis-
trict of Washington, Northern Division, wherein M.
C. Wood is plaintiff in error, and you are defendant
in error, to show cause, if any there be, why the judg-
ment in said writ of error mentioned should not be
corrected, and speedy justice should not be done to
the parties in that behalf.

Witness, the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United

States, this 11th day of [65] October, 1913, and of the Independence of the United States the one hundred and thirty-fifth.

FRANK H. RUDKIN,
United States District Judge, Presiding in the District Court.

[Seal]

Attest: W. H. HARE,
Clerk.

By Frank C. Nash,
Deputy.

Service admitted this 11th day of October, 1913.

CANNON, FERRIS & SWAN,
Attorneys for Defendant. [66]

[Endorsed]: In the District Court of the United States for and Within the Eastern District of Washington, Northern Division. M. C. Wood, Plaintiff, vs. The Potlatch Lumber Company, a Corporation, Defendant. Citation. Filed in the U. S. District Court, Eastern District of Washington. Oct. 11, 1913. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Praeipie for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said court, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Complaint;

Answer;

Reply;

Verdict;

Judgment on the Verdict;

Motion for Judgment *non obstante veredicto*;

Stipulation conceding power of Court to grant
motion for judgment notwithstanding the
verdict;

Opinion;

Judgment for defendant notwithstanding the
verdict. [67]

Order Extending Time to File Bill of Exceptions;

Bill of Exceptions;

Notice of Filing Bill of Exceptions;

Assignment of Errors;

Petition for Writ of Error;

Order Allowing Writ of Error;

Bond on Writ of Error;

Writ of Error;

Citation;

Praeipie for Transcript of the Record;

and any and all records, entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

[Endorsements]: Praeipie for Transcript of the Record. Filed in the U. S. District Court for the Eastern District of Washington. Oct. 29, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.
[68]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing pages num-

bered from No. 1 to No. 68, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, testimony and all proceedings had in said action as called for by the plaintiff and plaintiff in error in his praecipe for a transcript of the record herein, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 11th day of October, 1913. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$36.70, and that the same has been paid in full by W. H. Plummer, attorney for plaintiff and plaintiff in error. [69]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Spokane in said Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 29th day of October, 1913, and the Independence of the United States of America, the One Hundred and Thirty-eighth.

[Seal]

W. H. HARE,

Clerk, U. S. District Court for the Eastern District of Washington. [70]

[Endorsed]: No. 2337. United States Circuit Court of Appeals for the Ninth Circuit. M. C. Wood, Plaintiff in Error, vs. The Potlatch Lumber Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Received and filed November 3, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH JUDICIAL CIRCUIT.

M. C. WOOD,

Plaintiff in Error,

vs.

POTLATCH LUMBER COMPANY,

a Corporation,

Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR AND
WITHIN THE EASTERN DISTRICT
OF WASHINGTON, NORTHERN
DIVISION.

STATEMENT OF CASE.

In the month of September, 1911, and for some time prior thereto, the defendant owned, operated and controlled a large saw milling plant at Potlatch, Idaho, employing from time to time from 500 to 800 men. As a part of their saw milling plant the com-

pany had constructed and was operating a structure extending from the sawmill proper out to a receptacle called a burner, said structure being herein designated as the conveyer. Said conveyer was erected upon bents or upright timbers and extended out from said sawmill a distance of about 125 feet in length, and inclined upward so that at the mill said structure was 4 feet above the ground and about 40 feet above the ground at the burner end thereof. This conveyer is composed of a structure about 10 feet wide built of lumber, and through the center of which is operated an endless chain apparatus which runs over a sprocket wheel at the burner end thereof, and was, as one of the witnesses described it, "built and operated upon the principle of the old style straw stacker of a threshing machine," the endless chain running in a sort of a trough and upon said conveyer along the center thereof, so that by the continuous operation of said conveyer and endless chain refuse material was transported from the sawmill up and out to the large receptacle and dumped therein and burned. Along on either side of the endless chain apparatus and on top of said conveyer was a sidewalk so that men could work upon said conveyer when necessary, on either side of said endless chain, and go up and down the conveyer by this means.

Some days prior to the happening of the accident to plaintiff, which is the subject matter of this controversy, defendant had directed one Finnell, one of the foremen of defendant, to take some men and erect a scaffold at the burner end of said conveyer

for the purpose of putting in a new shieve wheel. No special orders or directions were given to Finnell how to accomplish said job of replacing said shieve wheel, and his work, both in securing materials, doing the work and replacing materials, was left wholly to his judgment and direction. Under Finnell's orders and directions certain timbers and lumber for the purpose of erecting said scaffold so as to reach said shieve wheel was taken from the yard of the defendant and transported by means of the conveyer up to the point at the shieve wheel, and there said scaffold was constructed, said shieve wheel replaced, and under the orders and directions of said Finnell the men under him, for the purpose of replacing said lumber down in the yard from where it was obtained, instead of transporting said lumber down into the yard by means of the conveyer in the manner in which it had been transported up to where the scaffolding was built, said men and said Finnell transported said lumber and timbers down said conveyer a distance of between 30 and 40 feet from where the scaffold had been erected and torn down, and there, under the orders and directions of said Finnell, and for the purpose of getting said lumber down and back into the yards, threw said lumber and timbers over the side of said conveyer down upon the ground. Six or eight pieces of timber had been thrown upon the ground and the next piece, which was thrown over by the foreman himself, struck the plaintiff, injuring him very seriously.

At the time, and for some days prior to his injury,

plaintiff was employed and working for said defendant, assisting in mixing mortar and doing brick masonry work under a foreman by the name of Nelson, repairing the burner at a point down upon the ground, and was in no manner connected with, or associated with the work being performed under Finnell or by the men performing said work, or with Finnell himself. Wood's duties were designated, and his instructions were given him by the foreman Nelson, and was of a different class and kind of employment and in a different department of service than that being performed by either Finnell or the men working under him. Wood's employment consisted in attending to the burner when the mill was in operation, and assisting in repairing the burner at time of injury.

The plaintiff, Wood, just prior to receiving the injury, had passed under the conveyer structure and went to the boiler room, which was situated on the opposite side of the conveyer, where he had been performing his work previously. When he passed under the conveyer the first time, going to the boiler room, the men were not up over and upon said structure over him, but were 35 or 40 feet up near the burner and had not thrown any timbers or boards down at all up to that time, and there was nothing to indicate that they had any intention of so doing. Plaintiff went to the boiler room to get some mortar and upon returning passed under said conveyer, as he had previously done numerous times, and just as he emerged from under said conveyer said foreman Finnell threw down the piece of timber which struck

plaintiff on the head and injured him. The piece that struck Wood was about eight feet long, six inches by eight inches in thickness and width. No pieces had been thrown down before the one which struck Wood for a period of five minutes prior thereto. Wood heard no warning of any kind and no means were taken or adopted by said foreman or by the company to warn plaintiff of imminent danger or to prevent him being hit by said timber. The place where Wood passed under said conveyer at the time of his injury was a regular pathway which had been used for a long time prior thereto by men and teams in the employ of the company as a means of thoroughfare to go from one part of the mill grounds to another. As many as 50 men would pass under this conveyer at this place in a day, and it was well known to the company that at any time men or teams were liable to pass under this conveyer at this point in going about their work. There was no reason why the timbers could not have been transported down to the ground by means of the conveyer in the same manner in which they were transported up. Finnell was one of the regular bosses or foremen of the company and Wood had worked under him before in and about the mill when it was running, but the mill was at the time of the accident undergoing certain repairs and closed down for that purpose. At the place where the timber was thrown down upon plaintiff said structure was from about 40 to 50 feet high above the ground, and said timbers were thrown that distance from the floor of the conveyer before they reached

the ground. The timbers were thrown down from the top of the conveyer to the ground, under the orders and directions of the foreman, Finnell, he, Finnell, assisting in doing said work.

Plaintiff brought suit against the defendant to recover damages for the injuries sustained and alleged in his complaint as the acts of negligence on the part of defendant "That in doing and performing the things hereinbefore mentioned on the part of said defendant through its said foreman Finnell, and the throwing of said timber down upon the plaintiff as aforesaid, defendant negligently and carelessly failed to use reasonable care in furnishing to plaintiff a reasonably safe place in which to perform his duties, and failed and neglected to keep said place reasonably safe, to the end that plaintiff might and could perform his duties with reasonable safety, and said defendant, as aforesaid, failed and neglected to use reasonable care in doing and performing the matters and things being done and performed by said Finnell and the gang of men under him while working upon the platform alongside of said conveyer, and failed in every manner to use reasonable care in said operation, to the end that plaintiff should not be injured."

The theory of plaintiff's case being that the defendant failed and neglected to furnish and maintain a reasonably safe place within which the plaintiff was required to perform his employment, in this—

1. That the defendant carelessly and negligently failed to adopt a reasonably safe plan of work, and the plan of work outlined, superintended and performed

by Finnell, the foreman of the company, was in itself dangerous to plaintiff while he was going about his work, passing under said conveyer in the performance thereof.

2. That the defendant failed and neglected to provide any notice, barrier or protection of any kind which would prevent plaintiff from passing under said conveyer at said time, or give him notice that there was danger in so doing.

3. That defendant negligently and carelessly set men to work upon said conveyer at a point over the pathway, which it was known plaintiff was liable to pass upon, and defendant knew, or ought to have known, that if said method of work was pursued and said timbers conveyed to the ground by the means adopted, in all reasonable probability plaintiff would be injured.

Complaint is not made, and no negligence is charged as to the *manner in which the timbers were thrown down from the conveyer at said point*, but plaintiff charges that it was negligence to throw said timbers down *at all*, under the circumstances, and contends that some other method should have been adopted to have had said timbers conveyed to the ground which would not have jeopardized the lives and limbs of employes, who, pursuant to their duties, were called upon, or did use said driveway or pathway under said conveyer, of which the defendant had notice, and the condition and use of said pathway for said purpose was an implied invitation and warranty on the part of the master that all reasonable

means would be adopted to keep said pathway reasonably safe for employes while using the same in the business of the defendant.

The case was tried to the Court and jury and a verdict rendered against defendant and in favor of plaintiff for the sum of \$5,000.00, upon which judgment was entered. Thereafter defendant served and filed motions for new trial and for judgment *non obstante verdicto*, it being stipulated by counsel that no question would be raised as to the jurisdiction or power of the Court to grant judgment *non obstante veredicto*, should the law, in his opinion, justify such action. The motion for new trial and motion for judgment *non obstante veredicto* were based upon the claim of defendant that the injury to plaintiff was caused by the negligence of a fellow servant, and that plaintiff assumed the risk of said injury. The Court sustained the motion for judgment *non obstante veredicto* upon the ground that the injury was caused by the negligence of a fellow servant of the plaintiff, and therefore no liability existed against the defendant, which opinion of the Court is made a part of the record in this cause, and said judgment and verdict was thereafter set aside and judgment entered for the defendant and against plaintiff, from which judgment this Writ of Error is sued out.

THE ISSUES.

Plaintiff in error contends—

I.

That the foreman, Finnell, and plaintiff were not fellow servants.

II.

That the law or rule of fellow servant has no application in the case at bar.

III.

That the cause of plaintiff's injury was not the *negligent manner* in which the timber was thrown down.

IV.

That the timber was thrown down purposely and as the result of a premeditated design on the part of Finnell, and was the exercise of a discretion on his part as to the manner in which the timbers should be conveyed and replaced upon the ground. Finnell chose the method to be adopted and in this respect he was representing the master and not performing the act of a servant.

V.

That the method pursued by Finnell in carrying out the orders of his superior was a dangerous method and plan of work, and the adoption of any plan of work, was the duty of the master and could not be delegated to Finnell and he given a right to use his discretion as to the method of work and the company thereby escape liability for the defective, unsafe and improper method and plan of work adopted.

VI.

That by reason of the adoption by Finnell, representing the master, of a dangerous, improper and

inadequate method and plan of work, which plan of work embraced the throwing of the timbers down upon the ground instead of conveying them down by other means, the place where plaintiff was performing his work, to-wit: the pathway under the conveyer, was rendered unsafe, which was the proximate cause of plaintiff's injury.

VII.

That defendant failed and neglected to provide for or give to plaintiff any warning of the imminent danger which threatened him, but invited him into a place of danger.

VIII.

That the master was negligent in placing said men to work up over the place where plaintiff was employed and performing his work, carrying on the kind of work which Finnell and his men were carrying on.

ASSIGNMENT OF ERRORS.

I.

That the Court erred in sustaining defendant's motion to set aside the verdict heretofore rendered by the jury in said cause in favor of the plaintiff and against defendant, and in vacating and setting aside the judgment rendered by the Court upon said verdict and granting judgment to defendant notwithstanding the verdict.

II.

That the Court erred in adjudging and ruling that the injury to plaintiff was caused by the negligence of a fellow servant of plaintiff.

III.

That the Court erred in holding and deciding that defendant is not liable in any manner whatsoever to plaintiff for the injury received by him alleged and pleaded in plaintiff's complaint.

IV.

That the Court erred in holding and deciding that there was no negligence suffered or committed by any one for which and for whom the defendant was responsible or liable.

V.

That the Court erred in vacating and setting aside the judgment in this cause in favor of plaintiff and dismissing the same.

ARGUMENT.

In order to lead to a thorough presentation of the questions involved, the points hereinbefore set out in detail will be considered separately as far as may be possible. At the outset, we are constrained to venture that the vast multitude of cases touching upon the question of the relation of fellow servants and the non-liability of the master for the negligence of such, and the apparent conflict of precedent and opinion among trial courts and those of last resort, is not brought about because of any lack of knowledge upon the part of such tribunals upon the law as laid down and established, but is due, most generally, to the

frailties of humankind, and a failure of the legal mind to apply the well settled law and adopted doctrine, to the given state of facts disclosed by the record in each particular case.

As a general rule it is true that the master cannot be made answerable in damages for an injury caused to one servant by the negligence of another, both being engaged in the same common employment. But it is conceded, even by the courts that most rigorously enforce this rule, that there are exceptions to it, and that it is not absolutely and invariably controlling in all cases in which a master is sued for injuries caused by the negligence of another person in the employment of the master. The decisions in the state courts of last resort relating to the rule and the exceptions to it are conflicting to a degree without parallel in any department of jurisprudence. In many jurisdictions there are exceptions to the rule based on the fact that the negligent servant was of a higher grade than the injured servant, and there are also exceptions based upon the nature of the injurious act as being one which was incidental to the discharge of functions which the master was absolutely bound to perform with reasonable care, whether he undertakes to perform them personally or deposes them to another servant.

A reading of the brief record which comes before your honors in the case at bar furnishes a glaring example of the fallacy of the doctrine of fellow servant, when the facts as gathered from the record in the case at bar are so strained as to support the position

of the trial Court that Finnell, the foreman in charge of the work in the course of which plaintiff in error was injured, was a fellow servant of the plaintiff in error. Such a finding cannot be supported by argument or authority. Before entering into a discussion of the enunciation of the courts of accredited respectability, your Honors' attention is directed to a brief resume of the facts disclosed by the record. Finnell, the foreman, who was in charge of the work of repairing the conveyer, was performing such work as the direct representative of the master. No special orders or directions were given him by the master as to how the work should be accomplished. The plan of work, the manner of doing the work, the securing of materials and the manner of placing such materials was by the master left to his sole judgment and direction. In the doing of such work he had charge of a crew of men. Plaintiff in error was not subject to the order of foreman Finnell, but was engaged under a foreman named Nelson, and was in no manner connected or associated with the work being performed by Finnell and his crew, but was of a distinctively different class of employment, and in an extremely different department of service. Manifestly the general control of Finnell over the work of the master then being accomplished and the relation which he occupied to such work, in effect supplanted him in the place of the master, and constituted him a vice principal. It is likewise manifest, and supported by text writers, by precedent and authority, that if the employer, whether individual or corporation, giving

no personal attention to the work, places it in the entire control of another, such person is regarded as a principal, and his negligence that of the principal. It is further the rule, that where the business of the master is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employes under them, vice principals and representatives of the master as fully and completely as if the entire business of the master were placed by him under one superintendent. The same authorities which support the doctrine herein contended for are likewise uniform to the effect that the question whether or not the master is liable to his employe for the negligence of a co-employe turns rather upon the *character of the act* than upon the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master. Among the established exceptions to the general rule as to the non-liability of the common employer to one employe for the negligence of a co-employe in the same service, is one which arises from the obligation of the master not to expose the servant when conducting the master's business, to perils and hazards against which he may be guarded by proper diligence upon the part of the master. It is elementary that the master cannot transfer or delegate to a servant a duty required of

him for the safety and protection of his servants, so as to exonerate himself from liability for injuries caused to another servant by its neglect or omission. The contract of service implies that in regard to these matters the employer will make adequate provision that no danger will ensue to the servant. If instead of personally performing his non-assignable duties, the master engages another to do it for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other duties, but is the neglect of the master to do those things which it is the duty of the master to perform as such.

II.

THAT THE LAW OR RULE OF FELLOW SERVANT HAS NO APPLICATION IN THE CASE AT BAR.

In *Northern Pacific R. Co. v. Peterson*, 162 U. S. 346, at page 353, the Court said:

"In addition to the liability of the master for his neglect to perform these duties, there has been laid upon him by some courts a further liability for the negligence of one of his servants in charge of a separate department or branch of business whereby another of his employes has been injured, even though the negligence was not of that character which the master owed in his capacity as master to the servant who was injured. In such case it has been held that such neglect of the superior officer or agent of the master was the neglect of the master, and was not that of the co-employee, and hence, that the servant, who was a subordinate in the department of the officer, could recover against the common master for the injuries sustained by him under such circumstances."

In *Hoersgen v. Southwestern Portland Cement Company*, Federal Reporter, Vol. 205, No. 8, September 4th, 1913, at page 881, determined by this Court, the Court said.

"When a servant is discharging some positive duty of the master—that is, doing some duty which he cannot delegate to another to escape liability for its negligent performance or omission—his liability will exist regardless of whether the negligent person was or was not a vice principal. There are many such duties, and among them is the duty of informing a servant of special or extraordinary risks connected with his services. In such case, whether the servant to whom said duty is delegated is higher or lower in the scale of employment is a matter of no importance. The duty is that of the master and he is responsible to the servant for its due and safe performance."

Mercantile Trust Co. v. Pittsburg & W. R. Co.,
115 Fed. 475, 53 C. C. A. 207.

Peters v. George, 154 Fed. 634, 83 C. C. A. 408.
Louisville & N. R. Co. v. Miller, 104 Fed. 124,
43 C. C. A. 436.

In *Metropolitan Redwood Lbr. Co. v. Davis*, Vol. 205 Fed. Rep. No. 5, Aug. 14, 1913, p. 486, at p. 489 we find the following expression:

"The master may delegate that duty (the duty of furnishing a safe place to his employes) *but the responsibility is still his, and he must answer for the default of the person who acts in his stead.* Quoting:

Nixon v. Selby Smelting Co., 102 Calif. 463,
36 Pac. 803.

Higgins v. Williams, 144 Calif. 182, 45 Pac.
1041.

In *Higgins v. Williams*, 144 Calif. 182, 45 Pac. 1041, at p. 1043:

"And it is a duty which cannot be delegated to another so as to exonerate the employer from liability

to an employe who is injured by the omission to perform the duty, or by its negligent performance. In *Fuller v. Jennett*, 80 N. Y. 52, the court said: 'In respect to such act or duty the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury; the act or omission is the act or omission of the master irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise, to secure the safety of its employes.' And see *Sanborn v. Trading Co.*, 70 Cal. 265, 11 Pac. 711, where the above language was quoted approvingly. In *David vs. Southern Pac. Co.*, 98 Cal., 24, 32 Pac. 710, the Court said: 'If the act was one which it was the duty of the master to perform toward its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant in the performance of such duty acted as the representative or agent of his employer for which the employer is responsible.' And to the same effect are the cases of *Elledge v. Ry. Co.*, 100 Cal. 282, 34 Pac. 720; *Nixon v. Head Co.*, 402 Cal. 458, 36 Pac. 803; and *Mullin v. Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535."

In *Nixon v. Seeley Smelting Co.*, 36 Pac. 803 (California) at p. 804 (bottom second column) it is said:

"This question (the question of determining whether negligence was of master or of fellow servant) must be determined, not from the grade or rank of the section foreman, but from the character of the act performed by him. If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it, to the injury of another servant in the same common employment, then the offending servant, in the performance of such duty, acted as the representative or

agent of his employer, for which the employer is responsible."

In the recent case of *Regan v. Parker Washington Co.*, 205 Fed. 692, the history of the subject of fellow servant from the earliest decision upon the subject is completely given, and in which such decisions are thoroughly referred to and discussed, the Court at page 703 adopts the following conclusion:

"We are of the opinion that the test to which the court brings us, and the one by which most, if not all, of the cases can be reconciled is 'the character of the act in respect to which the negligence occurs.' If the master is guilty of the breach of a legal duty, then he is liable, regardless of whether the breach was worked by one servant or another. A study of the opinions will show that the various phases, assumed risk, scope of employment, different departments of service, relation in business of the two employees, and whether the risk is or is not obvious, *has all given place to the nature of the act about which the injury occurs*; whether there has been a breach of some positive duty of the master; *if there has*, then the master is liable, *no matter what servant by his negligence caused the breach.*"

And again, at page 707, the Court said:

"Conditions are often deceptive, and a workman not charged with the duty of controlling conditions has a right to assume that the master in the exercise of a reasonable prudence will save him from dangers not clearly obvious and which may belong to other parts of the work."

In *Northwestern Fuel Co. v. Danielson*, 57 Fed. 915, we find a state of facts peculiarly applicable to the case at bar. At page 917 the doctrine contended for is supported by the following language:

"First: In removing these timbers that stood over plaintiff's head these men were delegated to

perform the personal duties of the defendant—the duty to use ordinary care to keep the place in which the servant was at work reasonably safe. *In the performance of this duty they were the representatives of the company. They were performing a duty which the master could not so delegate as to relieve it of liability, and their negligence in that respect was the negligence of the defendant.*

"Second: The danger from the negligence of these foremen in this work was a new and extraordinary risk, known to and created by the defendant after it employed the plaintiff. The plaintiff was ignorant of it. It was the defendant's duty to notify him of it, and it cannot charge him with the assumption of a risk which its own breach of duty kept him from having the opportunity to assume or escape from. A servant assumes the ordinary risks and dangers of the employment upon which he enters so far as they are known to him, and so far as they would have been known to one of his age, experience and capacity by the use of ordinary care, including the ordinary risks from the negligence of fellow servants engaged in a common employment. But he does not assume latent dangers known to the master, that are actually unknown to him. The risk of injury from the tearing down of the trestle work above him was not one of the ordinary risks of shoveling coal or removing materials from the dock beneath it when the plaintiff entered upon his employment. No one was then tearing down the trestle work; no one had been directed to tear it down; the bents above the plaintiff stood firmly upon the dock. He certainly assumed no greater risk than that of their falling of their own weight. He could not foresee that three hours later, by the master's order, they would be thrown down upon him, and he could not assume a risk that did not then exist, and that ordinary prudence could not anticipate. The defendant had placed him there to work. The place was reasonably safe. He had a right to rely upon the expectation that his master would use ordinary care to keep it reasonably

safe, and would notify him of any extraordinary risks that would likely occur. After the plaintiff had worked in this place for three hours, Mr. Stringer, the defendant's vice principal, created a new risk unknown to plaintiff. He directed the assistant foreman to take down the bents directly above the plaintiff. It was obvious to a man of the least sagacity that there was danger to the plaintiff below in loosening the timbers above him. Here was a new danger from the negligence of these servants in the performance of this new work, to which the plaintiff had not before been subject in the service he entered upon. This new and extraordinary risk the servant did not assume because he did not know about it. To him it was a latent danger. He was entitled to notice of it, and an opportunity to exercise option to leave the employment or assume the risk before he could be charged with its assumption. If one is employed to remove stone from a quarry where no powder is used, he does not assume the risk of the negligence of a fellow servant who is subsequently directed by the master, without his knowledge, to drill a hole in the quarry, charge it with powder, and fire a blast to loosen the stone. When such extraordinary risks are secretly ordered by the master after the employment is entered upon, he must be, and ought to be, held responsible for the result, unless the servant is informed, or by the use of ordinary care might have learned of the dangers (citing cases).

"Third: The negligence of the superintendent was the negligence of the defendant. We think all reasonable men must agree that the superintendent was guilty of negligence in ordering this trestle work torn down without notifying the plaintiff, his foreman or any of the men working under it that this was to be done. If the foremen were fellow servants of the plaintiff, and their negligence contributed to the injury, that did not relieve the defendant of its liability for the primary negligence of the master. The master is liable for an injury to a servant which

is caused by his own negligence and the concurrent negligence of a fellow servant.

"Railway Co. v. Callahan, 56 Fed. 988.

Railway v. Cummings, 106 U. S. 700.

Harriman v. Ry. Co., 12 N. E. 451.

Griffin v. Ry. Co. (Mass.), 19 N. E. 166.

Booth v. Ry. Co., 73 N. Y. 38.

Cone v. Ry. Co., 81 N. Y. 206."

In *Pennsylvania Steel Co. v. Jacobson*, 157 Fed. 656, at page 659 (Second Circuit) is found the following expression:

"Upon these facts could the jury have found the defendant guilty of negligence? An employer is bound to use reasonable care to furnish his employes a safe place in which to work. This is a continuing duty. *When changes in the servant's situation are brought about by the action of the master*, the latter is bound to warn him of the new danger, and take reasonable precaution for his safety. Here the changes in repairing the defective apparatus caused a change in Jacobson's situation, increasing his peril. The defendant, his employer, did nothing. The jury could have found that doing nothing was not doing his full duty."

In *Hurley Mason Co. v. Marks* (Wash.) 1911, 131 Pac. 1122, at page 1124, the Court said:

"It is claimed by the appellant that the act of Bell which caused the accident was a mere detail of the work, and in that act he was in any event a fellow servant and not a vice principal. (Citing cases.) The principle that runs through these cases is that where a vice principal is performing a mere detail of the work, and through his act or neglect a workman is injured, there is no liability on the part of the master, because in the performance of that duty he was in effect a fellow servant of the other workmen. But we think the principle of these cases is not applicable to the present case. The respondent's injury was directly due to the act of Bell in loosening the brace upon which the respondent stood at Bell's

direction and without warning from him. This was not a detail of the work but a positive act of Bell which produced the injury."

And again at page 1124 it is said:

"And, if it is the duty of the master to furnish a safe place, it is equally his duty to refrain from causing the place to become unsafe by his positive act, or that of his foreman, for which he is responsible."

The Supreme Court of Idaho, in the case of *Larsen v. LeDoux*, 11 Idaho 49 (81 Pac. 600), lays down the rule for which we contend in the case at bar, and enunciates the doctrine in language which unmistakably emphasizes the error of the trial Court in its reference to the rule adopted by that Court. In the case cited the Court said:

"If the act or omission that caused the injury was one pertaining to the duty the master owed to his servant, he is responsible for the manner of its performance without regard to the rank of the servant or employee to whom it was entrusted."

In *Maloney v. Winston Bros.*, 18 Idaho 740, 111 Pac. 1080, at page 748, it is said:

"It is contended that the servant assumed the risk. The position is correct to the extent that he assumed the risk incident to the employment, but he did not assume any additional burden of risk superimposed by reason of the master's neglect of the duty that rested upon him to have the place inspected and maintained in a reasonably safe condition as a place of the kind in which the employee might work.

And again at page 749:

"It is the well established rule of law, which has been adopted in this state, that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not upon

the grade or rank of the employee or fellow servant to whom the negligent act is traceable."

And again at page 751:

"Under the facts in this case and the circumstances under which the injury occurred, the nature of the place and the attendant circumstances as shown by the witnesses, we think there was sufficient evidence before the jury from which they might fairly conclude that the master, *who was represented by the shift boss*, was negligent in the discharge of his duty in inspecting and examining or failing to inspect, and in not giving such directions as were necessary in order to have rendered the place safe, and thereby avoided the injury which resulted.

In *Knauf v. Dover Lbr. Co.*, 20 Idaho, 787, we find the following language:

"While it is true that respondent assumed the *ordinary risk* that would arise from such service, *yet, he did not assume any additional risk imposed upon him by reason of neglect of appellant in the duty that rested upon it to make the place safe.*"

In the "*Pioneer*," 78 Fed. 600, at page 608, the Court said:

"The employer owed it as a *personal duty* to his employes to furnish them a safe place to do their work."

In the same case is quoted approvingly the language from *Herman v. Mill Co.*, 71 Fed 853, as follows:

"It is undoubtedly true that the master assumes the duty toward his servant of providing him with a reasonably safe place in which to work; *that this duty is a positive and personal one*; and that, if delegated to a subordinate, it remains, nevertheless, in law, the act of the master."

Bearing in mind the oft repeated statement that

the multitude of decisions upon the question under consideration, and the manifest conflict, is due to the failure to properly apply the peculiar facts arising in each particular case, the case of *Texas & Pacific Railway Co. v. Howell*, 224 U. S. 892, 56 L. Ed. 577, upholds the doctrine contended for upon a state of facts practically the same as involved in the case at bar. Briefly, the facts recited at page 894 show that plaintiff was digging a hole for a post under a coal chute. While he was at work the defendant put other men at work removing certain timber and planks from the floor, 12 feet above him, without his knowledge, and a piece of timber fell and struck him. From a judgment for plaintiff defendant appealed, resulting in an affirmance. Under contentions raised upon appeal, alike those here presented, the case was submitted to the jury with instructions that if the injury was due to the negligence of defendant in sending men to work above the plaintiff as a contributing cause, the defendant was liable. The Court said:

"We find nothing that requires us to reverse the judgment. It was open to the jury to find that the usual duty to take reasonable care to furnish a safe place to the plaintiff in his work remained. They well might be of the opinion that the general nature of the things to be done gave no notice to the plaintiff that he was asked to take a necessary risk. At the same time, they were warranted in saying that if the defendant saw fit to do the work above and below at the same time, it did so with notice of the dangers of those underneath, *and took chances which could not be attributed wholly to the hand through which the harm happened*. Even if Howell knew that repairs were going on overhead, that did not neces-

sarily put him on an equality with his employer, and require a ruling that he took the risk. (Citing cases).

In *Richardson v. Spokane*, 67 Wash. 621, at page 623, it is said:

"That it is the positive duty of the master to exercise reasonable care to furnish a safe place of work, and that the duty is a continuing one, has so often been stated by this and other courts as to require no citation of authority.

And at page 626:

"It may well be doubted whether there was any such consociation of employment between the respondent and the carpenters as to make them fellow servants within any just application of that doctrine. There was no opportunity for that mutual observation and protection which is the logical basis of the rule. 2 *Labatt Master & Servant*, Sec. 501."

And again at page 627:

"We have frequently stated and approved the principle that the duty of the master to provide a reasonably safe place and reasonably safe appliances for his servant is personal, and, whether this duty is performed by the principal or by his agent, whoever that agent may be and in whatever capacity he may be employed, the duty is still that of the principal. It is also well settled that, if the negligence of a fellow servant concurs with the negligence of the master, it does not excuse the primary negligence of the master for injury to another servant."

The breach of duty required of the master toward the servant in the case at bar was the proximate cause of the injuries sustained by plaintiff in error. The duty it owed him was not fully performed, and the jury properly found that the master had not done its full duty toward him. The liability does not depend in any manner upon the grade of service of a co-

employe, but upon the character of the act itself, and a breach of the positive obligation of the master.

Baltimore etc. R. Co. v. Baugh, 149 U. S. 368, 37 L. Ed. 772.

Hough v. Railway Co., 100 U. S. 213, 35 L. Ed. 612.

Northern Pacific R. Co. v. Herbert, 116 U. S., 29 L. Ed. 755.

Santa Fe Pac. R. Co. v. Holmes, 202 U. S. 438, 50 L. Ed. 1094.

New England R. Co. v. Conroy, 175 U. S. 323, 44 L. Ed. 181.

The duty of the master to provide a reasonably safe place to labor is a positive and continuing duty, and the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty. If instead of personally performing these duties the master engaged another to do it for him, he is liable for the neglect of that other, which, in such case, is not the neglect of the fellow servant, no matter what his position as to other matters, but is the neglect of the master to do that which it is the duty of the master to perform as such.

Northern Pacific R. Co. v. Peterson, 162 U. S. 346-353.

Northern Pacific v. Charless, 162 U. S. 359.

New England R. Co. v. Conroy, 175 U. S. 323-338.

Baltimore & O. R. Co. v. Bough, 149 U. S. 368-386.

Chicago & R. Co. v. Ross, 112 U. S. 377-383.

Hough v. Ry. Co., 100 U. S. 213.

Gardner v. Michigan Cent. R. Co., 150 U. S. 349-359.

Union P. R. Co. v. Daniels, 152 U. S. 684-688.

The servant has a right to look to the master for

the discharge of the duty it owes him, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the servant's right to insist that reasonable precaution shall be taken to secure safety in those respects. The question turns not upon the relation of the servants to each other, but upon the nature or character of the act in the cause of which the servant is injured.

Union P. R. Co. v. Daniels, 152 U. S. 684-689.
Baltimore & O. R. Co. v. Bough, 149 U. S. 368-386.

New England R. Co. v. Conroy, 175 U. S. 323-343.

The duty the master owes to the servant is a continuing one and must be exercised whenever circumstances demand it.

Santa Fe R. Co. v. Holmes, 202 U. S. 438,
50 L. Ed. 1094.

III.

THAT THE CAUSE OF PLAINTIFF'S INJURY WAS NOT THE *NEGLIGENT MANNER* IN WHICH THE TIMBER WAS THROWN DOWN.

The record in this case, and the verdict of the jury under the instructions given, establishes defendant's negligence. The trial Court in the course of his opinion said: "I further instruct you that if the person who threw this stick of timber down upon this man, if he did it without warning, was guilty of *gross and criminal negligence* * * * but

if you find that the accident happened through the carelessness of the master and the fellow servant, then the master is liable. That is, if he was injured through the failure of the master to furnish a reasonably safe working place, coupled with the act of a fellow servant in throwing the stick of timber upon him." To the end that our position may be properly understood the assignment under discussion may be passed by simply suggesting that the master's liability is not sought to be predicated upon the "negligent manner" in which the timber was actually thrown down, but by reason of the fact that the timbers were permitted to be thrown down *at all*. The liability is established and the language of the Howell case (*supra*) to the effect that the master "took chances which could not be attributed wholly to the hand through which the harm happened" becomes particularly pertinent.

IV.

For the sake of brevity the assignments numbered IV., V. and VI. will be discussed under one heading. Before beginning this discussion, however, we desire to call the Court's attention to the facts found in the record, which, to our minds, readily disclose and makes manifest the absolute lack of disposition upon the part of defendant in error to place their employees, and especially plaintiff in error, without the pale of protection against injury. It shows a manifest disposition on defendant's part to violate every duty it owed plaintiff in error, whether legal, moral or humanitarian. Can it be that the master is

permitted to escape liability by attempting to place the responsibility of his negligence upon his foreman, to whom he had delegated his positive duty? Conceding that he may so delegate his business, can he delegate his responsibility for the act of the one whom he has selected to represent him, in performing those duties which the law says the master must perform as the "master's" duty? Was plaintiff in error, engaged under another foreman, in another and separate gang of laborers, and in a distinctively different department, going about his work under instructions from the foreman of his gang, in a position in which he could have protected himself against such negligent acts? Neither argument can be made, nor precedent cited that will establish such an unwholesome doctrine as will permit of the escape from liability through the use of the term "fellow servants" nor can the doctrine be extended or have any logical application to other employes, who for any cause are not in a situation to exert such an influence on their fellows. It must follow, therefore, as an unanswerable proposition, that the cases to which this exception applies are only those where the servant receiving the injury is engaged with the servant inflicting it in a common business where he has an opportunity to exercise a preventative care over his negligence.

The timbers which were being used in making the repairs to the conveyer had been taken up by means of the conveyer. There is no reason why they should not have been returned to the ground in the same manner, except that the time of the master was

at stake. It would require more time to have taken the timbers down in the safe way, resulting in a greater expense, a somewhat more important consideration to the defendant in error than is the life or limb of an employe. Plaintiff in error was required, under instructions from his foreman, to pass under the overhead structure, and in doing so followed a regular driveway or pathway, through which roadway numerous teams passed daily and which was used daily as a passageway by upwards of "fifty men." When plaintiff in error passed through on his mission the men above were working "30 to 40 feet" nearer the burner and not directly over the driveway. The timber which was thrown from above was not the only timber which was so thrown down, but "six or eight" had been so **thrown**.

The timbers had been carried back from the burner and thrown down directly over the driveway beneath the conveyer or trestle without warning of any kind. Argument is unnecessary to convince that such a course could only result in injury to some one whom the master must have anticipated would lawfully and properly use the driveway, under the implied invitation and command of the master, and that the master failed in the performance of that duty which devolved upon it not to jeopardize the lives and limbs of its employes, whose duties, in obedience to the master's call, might be directed, as was plaintiff in error, to use the driveway or pathway beneath the conveyer. The vice lay in the negligent methods pursued, the defective and dangerous place of work,

the lack of warning, and the breach of the legal duty which the master owed to its servants not to expose them to extraordinary dangers and hazards, and in directing plaintiff in error to a place, which can only be properly characterized a "veritable death trap."

A most important consideration which we desire to impress upon your honors is the fact that at least five minutes elapsed between the throwing down of each piece of timber. Thus, much time was consumed in throwing all of the timbers down, and the claim cannot be made that plaintiff's injury was the result of a spasmodic act of negligence. The negligent course of conduct was the result of the master's negligence, followed for some time, and was the result of a defective and dangerous method of work, done and performed with the master's knowledge, or continued for a length of time sufficient to have enabled the master to ascertain the method being used, or a length of time sufficient to establish the negligence of the master in failing to secure such knowledge.

In *Hoersgen vs. Southwestern Portland Cement Co.*, Federal Reporter, Vol. 205, No. 8, Sept. 4, 1913 (this Court) the Court adopts the following language at p. 881:

"A qualification of the general rule which is relevant here has been recognized by authorities which are controlling in this court. It is, in brief, that when the one guilty of negligence has such general control and occupies such a relation to the business in connection with which the injury occurred that he takes the place of the master, he is held to be a vice

principal * * * a representative of the master
 * * * and not a fellow servant, and the principle
 of this general rule is carried further. When the
 business of the master is so large and diversified
 that it naturally divides itself or is divided into
 departments of service, the individuals placed by the
 master in charge of separate departments or branches
 of service and given entire control therein are properly
 to be considered in respect to employees under them
 vice principals—representatives of the master."

Northern Pacific vs. Dixon, 194 U. S. 338, 344.

Baltimore & O. R. Co. vs. Baugh, 149 U. S.
 368, 383.

Northern Pac. R. Co. vs. Peterson, 162 U. S.
 346.

Alaska U. Q. W. Co. vs. Muset, 114 Fed. 66.

Klauder vs. Welden D. M. Co., 183 Fed. 962,
 106; C. C. A. 302.

In the course of the trial Court's opinion in sustaining the motion of defendant in error for judgment (transcript p. 24), the case of *Donnelly vs. San Francisco Bridge Co.*, 49 Pac. 359, is cited, but manifestly the conclusion there reached supports the contention of plaintiff in error. At p. 561 the Court said:

"If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant in the performance of such duty acted as the representative or agent of his employer, for which the employer is responsible." (Citing):

Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720.

Nixon v. Lead Co., 102 Cal. 458, 36 Pac. 803.

Mullin v. Horseshoe Co., 105 Cal. 77, 38 Pac. 535.

Railway Co. v. Needham, 63 Fed. 107.

Railroad Co. v. Baugh, 149 U. S. 387.

And again at p. 561:

"The liability of the appellant is to be determined by the character of the act through which the injury was sustained, or of his functions in reference to the act, and not by the rank or station of the employe under whose direction the act was performed. Where the negligence is in an act which the master must personally perform, the person to whom he delegates its performance is his agent, and the master is responsible for the negligence."

In *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78, where plaintiff was injured by the caving of a trench, with the cutting of which he had nothing to do, but in which he had been directed to lay pipes, and it appeared that a competent foreman had been placed in charge of the work, provided with all necessary materials for the protection of the side walls, but had not used them at this point because he thought they were not necessary, the Court said:

"An employer is not relieved from responsibility to an employe who has been injured in consequence of his failure to make the working place reasonably safe, by proof that he employed a competent superintendent or foreman, supplied him with the necessary appliances, and gave him all needful instructions for the purpose. He cannot escape responsibility by delegating his duty in this behalf to another, because it is his implied contract with the employe that he will see to it that the working place is reasonably safe, in view of the character of the work to be performed, and this obligation is not satisfied by devolving it upon a subordinate."

In the *Magdaline* (D. C.), 91 Fed. 789, Judge Thomas said as follows:

"A master may not place his servant at a work made dangerous by the nature of the work of other servants, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the negligence of a co-servant or third person employed on the premises, the injury would not have happened."

In the *Pioneer* (D. C.), 78 Fed. 600, 609, decided by this Court, opinion by Judge Morrow, it is said:

"In the view taken by the court, no question of the negligence of a fellow servant can arise in this case. The injury to respondent, under all the facts of the case, arose by virtue of the breach on the part of his employes, the petitioners, of a personal duty which they impliedly owed him, to see to it that the places on the vessel in which he was compelled in the course of his employment, and by reason of the nature of his duties, to proceed to and from, should be reasonably safe and free from danger; and having failed to fully perform and discharge this personal duty, it is such negligence as entitles respondent to recover for the damages he proximately sustained thereby.

"The defendant failed and neglected to provide for or give to plaintiff any warning of the imminent danger which threatened him, but invited him into a place of danger."

The facts hereinbefore referred to evidence the existence of the pathway and driveway through which plaintiff in obedience to his master's directions was attempting to pass at the time of his injury, and the facts are likewise undisputed that no rules were promulgated or enforced to promote the safety of plaintiff. Had the master made and enforced a reasonable rule for the conduct of the work, to the end that some warning might have been given that the timbers were to be thrown to the ground immediately over

the driveway through which plaintiff was directed to pass, then the accident would not have happened. This duty is the absolute duty of the master, and the master is responsible for the conduct of any agent or servant to whom he delegates it.

In *Western Electric Co. v. Hanselmann*, 136 Fed. 564, 69 C. C. A. 346, at page 348, it is said:

"In the case at bar, however, the facts call for the application either of the well settled rule that a master is liable when he either fails to provide for giving warning of danger or entrusts the duty of giving such warning to an employe so engrossed with other duties that he could not properly and efficiently give the necessary warning, or of the other equally well settled rule, established by oft' repeated decisions in this and other circuits, that when the perils to be apprehended arise either from outside and independent conditions, or from the doing of other extraneous work by defendant's servants, distinct and separate from the work in which the servant is engaged, the master is bound to employ the necessary means to give timely warning of such danger, and that he cannot delegate his duty to any other person, so as to relieve him from liability for the negligent failure to give such warning."

See also:

Toledo B. & M. Co. v. Bosch, 101 Fed. 530,
41 C. C. A. 482.

Orman v. Salvo, 117 Fed. 233, 54 C. C. A. 265.

McGoven v. C. V. R. Co., 123 N. Y. 280, 25
N. E. 373.

Bellville S. Co. v. Baker, 39 L. R. A. 834.

In *Ellis v. N. P. Ry. Co.*, 103 Fed. 416, at p. 417, we find the following:

"The duty of exercising reasonable care in furnishing to a servant a reasonably safe place to work is that of the master, and he cannot delegate his duty

to a subordinate without placing such subordinate in his own position, and binding him to perform the same duties devolving upon him (the master). McKinney Fel. Ser. p. 73, Sec. 28, citing Hough v. Ry. Co., 100 U. S. 213, 25 L. Ed. 612.

See also:

Armann v. Galkowska, 66 N. E. 1037, 1039.
Williams Grover Tank Co. v. O'Donnell, 60 N. E. 831, 832.

Woods v. Lindwall, 48 Fed. 62.

Thompson v. Sterrett Co., 149 Fed. 721.

Choctaw v. O. & G. R. Co., 191 U. S. 64.

Again recalling the language of Judge Thomas, in the Magdaline (D. C.), 91 Fed. 789: "A master may not place his servant at a work made dangerous by the nature of the work of other servants, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the negligence of a co-servant or third person employed on the premises, the injury would not have happened," and applying the principles enunciated to the facts in the case at bar, we confidently assert that a consideration of the questions involved should lead to the reversal of the order sustaining the motion of defendant in error for judgment *non obstante veredicto*, and that the verdict of the jury and judgment heretofore rendered should be reinstated.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

7

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE
Ninth Judicial Circuit

M. C. WOOD,
Plaintiff in Error,

vs.

POTLATCH LUMBER COM-
PANY, a corporation,
Defendant in Error.

No. _____

ANSWERING BRIEF OF DEFENDANT
IN ERROR.

*Upon Writ of Error to the United States District
Court for and within the Eastern District
of Washington, Northern Division.*

STATEMENT OF THE CASE.

There is no conflict in the testimony of this case. The material facts are as follows: The defendant owns and operates a saw mill plant at the town of Potlatch in the state of Idaho. A conveyer leads from the mill to a burner situate about one hundred and twenty-five feet distant from the mill in which waste and refuse matter is carried from the mill to the burner and consumed. This conveyer leaves the mill about four feet above the ground and enters or connects with the burner at a height of forty-five or

fifty feet from the ground. The conveyer has a railing and footwalk on either side, is about eight or ten feet in width, and is supported by wooden bents sixteen feet apart. At the time the plaintiff received the injuries complained of, the mill was closed down for repairs. About three days before the accident three workmen were directed by the superintendent or millwright to make certain repairs on a sprocket-wheel at the end of the conveyer next to the burner. To accomplish this work it became necessary to erect a scaffold, and for that purpose a number of timbers, estimated at from six to ten, were carried up from the mill over the conveyer to the burner. After the repairs on the sprocket-wheel were completed these timbers were taken down and carried back down the conveyer to a point about twenty-five feet from the burner and perhaps thirty feet above the ground. During this same period of three days the plaintiff and another crew of workmen were engaged in making certain repairs within the burner, the plaintiff mixing the mortar which was used for that purpose on the outside of the burner. On the morning of the accident the plaintiff found it necessary to go from his place of work to the boiler or engine room in search of lime, and in so doing passed under the conveyer between two of the supporting bents at a point about twenty-five or thirty feet distant from the burner and directly beneath the timbers which had been used in the scaffold and removed to that point. On his return one of the men engaged in making the repairs on the sprocket-wheel threw one of the timbers which had

been removed from the scaffold to the ground below, striking the plaintiff and caused severe and permanent injuries to his head. For the injuries thus received a recovery of damages is sought in this action. It may be further stated that one of the men making the repairs in the burner was in charge of the crew there employed, and one of the men engaged in making the repairs on the sprocket-wheel was in like charge. These two men are referred to in the testimony as straw bosses, and it was the man in charge above who threw the stick of timber that caused the injury.

The sufficiency of the testimony to support a verdict is the only question involved.

ARGUMENT AND AUTHORITIES.

The negligence complained of by plaintiff in his complaint is the failure on the part of the defendant to furnish him with a reasonably safe place in which to work, and the failure to warn of the dangers. In the court below plaintiff relied upon the fact that Fennell, the man who threw down the timber in question, was a foreman, or vice-principal, for whose negligent act the defendant was liable. The trial court held that Fennell was a fellow servant of plaintiff for whose negligence the defendant was in no wise responsible, and as plaintiff's injury was due solely and alone to the negligent act of Fennell, the trial court denied a recovery. It is evident from plaintiff's brief that in order to avoid the force of the opinion of the trial court to the effect that the negligence of Fennell

was the proximate cause of the injury, and that he was plaintiff's fellow servant, a different theory is now relied upon and presented. If we correctly grasp plaintiff's present theory, it is this: the work which Fennell and the men working under him were performing was of such a character that it required defendant to adopt some specific plan or method for doing the work, or, stated in another way, this work was of such a character that the defendant could not turn it over to Fennell and allow him to use his judgment and common sense in selecting a method for doing the work without rendering itself liable to another employe who might be injured by the negligence of Fennell in selecting the proper method. This contention cannot be sustained. That plaintiff and the straw boss, or foreman, Fennell, who threw down the timber which caused plaintiff's injury, are fellow servants, is established beyond controversy by the following decisions:

- Alaska Treadwell G. M. Co. vs. Whelan*, 168 U. S. 86, 42 Law ed. 390;
N. P. Ry. Co. vs. Charles, 162 U. S. 359, 40 Law ed. 999;
Central Ry. Co. vs. Keegan, 160 U. S. 259, 40 Law ed. 418;
Martin vs. Atchison Ry., 166 U. S. 399, 41 Law ed. 1051;
N. P. Ry. Co. vs. Dixon, 194 U. S. 338, 48 Law ed. 1006;
Baltimore Ry. vs. Baugh, 149 U. S. 389, 37 Law ed. 781;
Bentler vs. Grank Trunk Ry. 224 U. S. 84, 56 Law ed. 679;
Texas Ry. vs. Bourman, 212 U. S. 531, 53 Law ed. 641.

The plaintiff was engaged in working in and about the burner in question and so was Fennell. They were engaged in the same general undertaking, and in the same department of the defendant's business. The testimony of Fennell shows that he was the boss in charge of the men fixing the sprocket-wheel at the end of the conveyer. That Charles Hibbard was foreman in charge of the entire work, and that Mr. Seymour was superintendent over Mr. Hibbard (36, 37). The witness Albert testified that Mr. Laird was in charge over Mr. Seymour. On page 33 of the transcript he testified as follows:

"Mr. Laird would give his instructions to the superintendent, the superintendent would give the instructions to the foreman, and the foreman would give the instructions to the men working under him, and while I was up there working with the other men Mr. Fennell told us two men what to do."

Again at page 34 he testified as follows:

"I knew Mr. Wood as I had worked with him before. He was working under a boss by the name of Mr. Nelson. He and Nelson were working for some days doing mason work, repairing the burner itself, using lime, brick and like materials."

Under this state of facts, which was proven by the plaintiff himself, the plaintiff and Fennell were fellow servants within the rule announced in the above cases. With reference to the work which he was delegated to perform, Fennell testified (36, 37):

"Mr. Charlie Hibbard, the foreman of the

mill, sent me up there and told me to take charge of these men and do this work. He, Charlie Hibbard, the mill foreman, had charge of everything around there. Hibbard told me to go up to the top of the burner and remove a sprocket-wheel in the end of the conveyer and put in a sheave in its place. Hibbard did not give me any other instructions. In order to do this work it was necessary to take some lumber up there from the yard to the top of the conveyer and there build a scaffold and afterwards to replace the lumber down on the ground. This was all left for me to do and to have charge of."

With reference to how the timber was taken down, the witness Albert testified as follows (31, 32, 35):

"We had hauled some timbers up to build a scaffold. These timbers were taken from the ground down below and conveyed by the conveyer up to the burner, where we took them off and built a scaffold so as to be up high enough to put in a new sheave wheel, and just before the accident happened we had completed this work, and was tearing the scaffold down, and under instructions from Mr. Fennel I was taking the scaffold apart, and the different timbers and lumber was put in the conveyer, where it was conveyed down to the point on the conveyer up over the place where Mr. Wood was injured. The distance we took the lumber down where the scaffold had been built was about 25 or 35 feet. There were six or ten large pieces of timber that we placed on the conveyer platform under orders of Fennell, from which point they were afterwards thrown down upon the ground. I had not thrown any pieces down on the ground myself, but Fennell and the other man had thrown down about six or eight pieces. The piece that struck Mr. Wood was about eight feet long and six inches by eight inches in thickness and width. * * *

There was no reason why the timbers could not have been continued down upon the conveyer to the ground the same as they had been brought up, and the timbers were being thrown over the side by the orders of Mr. Fennell who was in charge of the work. Mr. Fennell himself threw down the one that struck Mr. Wood. * * *

We were working up close to the burner a short time before the accident and when we got through there we were supposed to take out lumber and throw it down on the ground. This was Fennell's orders. We were not working three days right above and over the place where Wood was hurt but were working up near the burner a distance of 25 or 30 feet from where the timbers were afterwards thrown down on the ground. Fennell and 'Shorty' were only at the place on the conveyer above and over where Wood was walking at the time of his injury just a few minutes before he was hurt. In fixing this sprocket-wheel the sprocket-wheel was up near the burner and we worked there three days until we got through working on this scaffold and then we tore the scaffold down and brought the lumber down to the place where it was afterwards thrown over the other side down upon the ground."

Fennell testified with reference to throwing the timber as follows (44):

"I threw the stick down that must have struck him. I never saw him there at all until after he was hit. There was nothing to prevent me from replacing these timbers on the ground down below by using the conveyer or by letting the same down with ropes, or by throwing the same down at some other point. The pieces were being thrown down by my orders, but I did not know there was anybody down there who would be liable to be hit."

This work which was being done, as appears from the testimony above quoted, was of a very simple character. The act of lowering several pieces of timber from the conveyer to the ground was one which did not require the supervision of the master, and one which he could delegate to a competent servant. It is to be remembered that the plaintiff nowhere charges in his complaint that Fennell was incompetent or that the defendant was negligent in employing him; neither is it charged that the defendant was negligent in failing to supervise the work in question. The question therefore presented by plaintiff's brief is whether or not the defendant could delegate to Fennell, whose competency is in no way question, the supervision and adoption of a method of doing the work here in question. Under the authorities this question must be answered in the affirmative. That plaintiff's place of work was reasonably safe, except for the negligent act of Fennell, must be conceded. The method of getting these timbers down to the ground was a simple detail of the work which the defendant could delegate to Fennell, and rely upon his good judgment and common sense to use such precautions as were necessary for the safety of his fellow servants.

In *Deye vs. Lodge & Co.*, 137 Fed. 480, every contention which is here made by plaintiff was urged and rejected by the court. In that case it appears that plaintiff was injured while engaged with others in moving a large iron casting by the falling of one or more similar castings from a pile adjacent to the

casting being removed. There was no claim that the foreman Lutz was incompetent, but it was contended that the defendant should have adopted some method or plan for doing the work and not delegated this to the judgment of a foreman. In passing upon the case the court, speaking through Judge Lurton, said:

"The general fitness and competency of Lutz, the foreman, who is said to have negligently piled the castings which fell and injured Deye, was not questioned. That Lutz and Deye were fellow servants, and that each assumed, as part of the risk of the business, the risk of the negligence of the other and of the other workmen engaged in and about the castings and cleaning branch of the defendant's business, is equally undisputable. The case must turn, therefore, upon the question as to whether the place of work was dangerous through neglect of any personal duty imposed by law upon the employer. The contention is that the place where Deye was called upon to work when hurt was a dangerous place, by reason of its proximity to a pile of castings which were liable to slip and all because not properly piled, with strips of wood between them. The place was safe enough, except in so far as it was made unsafe by the system or manner in which these castings were piled. There was evidence tending to show that these beds would not have been so liable to slip and fall if sticks of wood had been placed between the castings when being piled up, and that it was the practice of some shops and founderies to interpose pieces of wood to guard against slipping or falling. There was also evidence tending to show that no wood had ever been used or supplied for that purpose, nor any direction given by the defendant in error concerning the method of piling such castings. No other instance of the falling of such castings in this or any other shop was shown, nor did the foreman make any request for

strips of wood to use when stacking them up, although he testified that he knew the danger and practice of using such strips in other shops in which he had worked.

Was the defendant company under any duty to supervise the method of piling such castings, or was that a detail of the business which might be left to the judgment of the men whose business it was to receive, pile and handle them? The system or manner in which they were piled when received from the foundry, and kept until needed for use in the machine shop, was one adopted by Lutz and those who were his fellow servants in this branch of the business. The case must therefore turn upon the question as to whether the defendant company, as the employer, owed any non-delegable personal duty in respect to supervising the methods adopted by Lutz and his fellow workmen, of whom Deye was one, for stacking, storing, or piling these rough castings.

That an employer engaged in a complicated and dangerous business is under obligation to prescribe rules for its orderly and safe conduct is a well-settled principle of the law of master and servant. *B. & O. R. R. vs. Doty* (C. C. A.), 133 Fed. 866; *Woods, Law of Master & Servant*, Sec. 403; *Shearman & Redfield on Negligence*, Sec. 202; *Slater vs. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627. *But this rule presupposes a complicated business, involving danger to those conducting it unless it be managed upon some prescribed system.* A railway business is an example. The general business conducted by the defendant corporation may, in some of its aspects, be one of such complexity and danger as to require its conduct according to system or rule, having regard to the safety of its servants. But the matter we have to deal with is the simple question of receiving and piling rough, heavy castings in a room devoted to their storage until cleaned and

needed in the machine shop. These castings had been made in the foundry. The next step was their transportation from the foundry to the place where they were to be kept and cleaned, and piled to wait their removal to the machine shop, to be there converted into a great tool by skilled men. The work which Lutz and the men under him, including Deye, were engaged to do, was the work of receiving, piling, and cleaning these and other castings; and if they were negligently piled, it was because a part of the very work which they were employed to do was done in a negligent manner. It is true that Deye had not helped receive or pile these lathe beds; true, he had not before been required to assist in lifting one for removal to the machine shop. Nevertheless, his employment involved every phase of the work superintended by Lutz. *We say, therefore, that the mere detail of how these castings should be piled was a part performance of the work itself, the risk of which he had assumed. Lutz was an experienced foreman. He was, in law, the fellow servant of the plaintiff; and his neglect, if his failure to properly pile these castings be regarded as negligence, was the negligence of a fellow servant, unless the method or manner of piling them constituted so complex or dangerous a matter as to require the active and personal direction or supervision of the master. But we are not able to bring ourselves to the conclusion that the circuit judge erred in holding that there was anything in the nature of this part of the work intrusted to Lutz and his fellow servants as to make it the personal duty of the defendant company to lay down a rule or system for piling them, or to personally superintend the manner in which the men engaged in the work should do that part of it. If such a matter is not a detail of the general business which may be intrusted to the judgment and common sense of the men whose business it was to receive, pile and handle such castings,*

there is no detail which indirectly involves the safety of the place where work is being carried on which must not be personally supervised. Unless the business be of such a complex and dangerous character as to require that it shall be conducted upon a system or scheme, in order to secure the orderly conduct of the business and the safety of those engaged in it, the master's obligation to supply a safe place for his work to be done, and to keep it safe, does not impose the duty of always keep it in a safe condition so far as its safety depends upon the proper performance of the very work which his servants have there undertaken or do. If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation. If it was the duty of the defendant company to see that Lutz used sticks in piling these castings while waiting the next step in the work upon them, it would be hard to say why it would not be equally the duty of an employer to supervise the temporary piling or storing of brick or lumber or stone or barrels or boxes containing the material to be used by the men upon the premises. Matters of this kind are not so complex or dangerous as to demand the direct supervision of the master, but are details which, from a reasonable consideration of the rule of master and servant, may be and must be left to the common sense of the men doing the work, as one of the risks of the business. Cullen vs. Norton, 126 N. Y. 1, 6, 26 N. E. 905; Morgan vs. Hudson River O. Co., 133 N. Y. 666, 31 N. E. 234; Perry vs. Rogers, 157 N. Y. 251, 51 N. E. 1021. Although it is the duty of a railway company to give correct orders for the running of its trains, and the train dispatcher stands for and represents the master in this matter, yet, if he gives an order which brings on a collision, by reason of the negligence of a local telegraph operator in falsely reporting the

passing of a train, the company is not liable to trainmen injured in the collision, such local telegraph operator being, in respect to the matter, the fellow servant of the men injured. Ill. Cent. Ry. vs. Bentz, 40 C. C. A. 56, 99 Fed. 657; N. P. R. Co. vs. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. ed. 1006.

The conclusion we reach is that the place where the plaintiff was injured was only dangerous because of the negligence of his fellow workmen in the manner of carrying on the work, the risks of which he had assumed. Armour vs. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. ed. 440; Finalynos vs. Utica M. Co., 67 Fed. 507, 14 C. C. A. 492; Galow vs. C., M. & St. P. Ry., 131 Fed. 242, 65 C. C. A. 507; Cleveland, etc., Ry. Co. vs. Brown, 73 Fed. 970, 20 C. C. A. 147; Liermann vs. Milwaukee Dock Co., 110 Wis. 599, 86 N. W. 182."

The facts in the case at bar show that the work which was being performed was as simple in character as the work which was being performed in the Deye case, *supra*, and under the authorities cited in that case, it is clear that the master is under no obligation to adopt a method or to supervise the manner in which simple work of this character is done, but that this may be delegated to a competent man such as Fennell was in the case at bar.

In Central Railway vs. Keegan, 160 U. S. 259, 40 L. ed. 418, it appears that Keegan, together with several other men, was employed by the Railway Company in its yards. It was claimed that the accident was due to negligence on the part of O'Brien, and that his negligence was of such a character as to ren-

der the railway company liable. The court held, however, that these men were fellow servants, and in the opinion delivered by the present Chief Justice White, the court said:

"Applying the principles announced by this court and the supreme court of New Jersey to the facts of the case at bar, it is clear that O'Brien and Keegan were fellow servants. O'Brien's duties were not even those of simple direction and superintendence over the operations of the drill crew; he was a component part of the crew, an active co-worker in the manual work of switching, with the specific duty assigned to him by the yardmaster of turning the switches. He was subordinate to the yardmaster who had jurisdiction over this and other drill crews, and it was the yardmaster who employed and discharged all the workmen in the yard, giving them their general instructions, and assigning them to their duties. O'Brien's control over the other members of the drill crew was similar to the control which a section foreman exercises over the men in his section; and, following its construction of the decisions of this court, in *Baltimore & O. R. Co. vs. Baugh*, 149 U. S. 368 (37:772), and *Northern P. Ry. vs. Hambly*, 154 U. S. 349 (38:1009), the circuit court of appeals for the eighth circuit has held that a section foreman is a fellow servant of a member of his crew, and that one of the crew, injured by the negligence of the foreman, cannot recover. *Kansas, etc., Co. vs. Waters*, 70 Fed. 28.

In *Potter vs. N. Y., etc., Co.*, 136 N. Y. 77, employes of a railroad company, while switching cars in the company's yard under the direction of a yardmaster, shunted a number of cars onto a track so that they collided with a car being inspected, and caused the death of the inspector. It was claimed that the proper and reasonable

care required that there should have been a brakeman on the front of the cars to control in an emergency their motion when detached from the engine. In the absence of allegation of proof to the contrary, the court presumed that competent and sufficient servants were employed, and proper regulations for the management of the business had been established, and observed (p. 82):

It is quite obvious that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants of the railroad who are intrusted with the management of the yard. The details must be left to them, and all that the company can do for the protection of its employes is to provide competent co-servants, and prescribe such regulations as experience shows may be best calculated to secure their safety.

We adopt this statement as proper to be applied to the case at bar. *A personal, positive duty would clearly not have been imposed upon a natural person, owner of a railroad, to supervise and control the details of the operation of switching cars in a railroad yard, neither is such duty imposed as a positive duty upon a corporation; and if O'Brien was negligent in failing to place himself or someone else at the brake of the backwardly moving cars, such omission not being the performance of a positive duty owing by the master, the plaintiff in error is not responsible therefor."*

If it was not the duty of the railway company in the Keegan case, to supervise and control the details of the operation of switching cars in its railroad yards, it is difficult to conceive how it can be contended that it was the duty of the defendant, in the case at bar, to supervise and control the details of lowering these few

timbers to the ground, particularly in view of the fact that plaintiff's own witnesses testified that the timbers could be safely conveyed to the ground either upon the conveyer or by ropes. The master had a right to assume that Fennell would adopt a reasonably safe method.

In *American Bridge Co. vs. Seeds*, 144 Fed. 605, it appears that the plaintiff was directed by the foreman to go to a certain point upon the work and hook a chain, and that in doing the work the plaintiff walked across a certain stringer upon planks, and then along the stringer to about the middle of the chords, where he wrapped the chain around the chords and hooked it, and waited until he saw it would not become unhitched. There was a signal in use which was called the "high ball," which signified that the load should be raised rapidly. As soon as the plaintiff saw that the hitch would hold he walked along the stringer to the plank for the purpose of returning. As soon as he left the hitch the foreman gave the signal called the high ball, and the load was rapidly raised, and swung around and knocked the plaintiff off the plank and injured him. The court held that this was the negligence of a fellow servant; and it must be conceded, we contend, that the method of doing the work in that case rendered the working place of the plaintiff unsafe to the same extent as did the method adopted by Fennell in the case at bar render the working place of the plaintiff unsafe. The court held that the foreman and the plaintiff were fellow servants, and that the plaintiff's injury, being

due to the negligence of the foreman, there could be no recovery. In passing upon the question of whether or not the master should anticipate negligence on the part of his servants, the court said:

"There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon the natural and probable result of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practicable basis for the measurement of the acts, rights or remedies of mankind. *Little Rock & M. R. Co. vs. Barry*, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349; *Cole vs. German Sav. & L. Soc.*, 59 C. C. A. 593, 124 Fed. 113, 63 L. R. A. 416. Mr. Justice Holmes in delivering the opinion in *Burt vs. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 6, 13 L. R. A. 97, said:

'Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual.'

The court further held in that case that the risk that a safe place might become dangerous or unsafe, because of the negligent act of the fellow servants employed in carrying on the work, was one of the ordinary risks which the servant assumed. In its opinion the court said:

"The risk that a safe place will become unsafe, or that safe machinery will become dangerous, by the negligence of the servants who use them, is one of the ordinary risks of the employment

which the servants necessarily assume when they accept it. *It is a risk of operation and not of construction or provision, and the duty to protect place and machinery from dangers arising from negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them.* A railroad and its equipment is a place to labor and a machine with which to perform work. Originally safe, it is made dangerous by the failure of a servant engaged in operating a train to properly turn a switch (St. Louis &c. Ry. Co. vs. Needham, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833); by the failure of a switchman to properly place red lights (Brady vs. Chicago &c. Ry. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712); by the direction of a yardmaster to an engineer and conductor to take their train over a track on which another train is standing (Penna. Co. vs. Fishack, 123 Fed. 465, 59 C. C. A. 269); by the failure of an engineer to obey his instructions which results in a collision (B. & O. R. Co. vs. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; Howard vs. Denver &c. Co. (C. C.), 26 Fed. 837, where Judge Brewer said: 'The true idea is that the place and the instrument must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employe of the machinery shall create danger'); by a failure of a conductor to require his brakeman to remain on the top of a train whereby a break occurs without their knowledge (R. R. Co. vs. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 11 L. ed. 181); by the negligence of a conductor whereby the place where a laborer is building a culvert is made dangerous, and he is struck by the locomotive (N. P. Ry. vs. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009); by the act of a foreman of a gang of laborers who suddenly stops a handcar without notice and causes a collision with another immediately fol-

lowing (*N. P. Ry. vs. Peterton*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. ed. 994); by the disobedience of a rule which requires personal notice to workmen on certain tracks that cars are to be moved thereon (*Grady vs. Southern Ry. Co.*, 34 C. C. A. 494, 92 Fed. 491); by the failure of an engineer and a foreman to take notice of and prevent an approaching collision of an engine and a handcar (*Martin vs. Atchison*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. ed. 1051); and by a thousand other acts of negligence of servants of railroad companies, which make the places where their fellow servants are employed and the machinery which they are using more dangerous. But the duty of the master does not extend to guarding the places or the machinery he furnishes against the dangers of such acts. They are violations of the primary duty of the servants.

Again, a superintendent who is a fellow servant of the workmen under him, negligently directs them to use a derrick furnished by the employer to raise heavy weights before the derrick is securely fastened in its place, and it consequently falls and injures a workman (*Kelly vs. Jutte & Foley Co.*, 104 Fed. 955, 44 C. C. A. 274); an officer upon a ship carelessly leaves a hatchway open, and a servant falls through and is injured (*Olson vs. Oregon &c. Co.*, 104 Fed. 574, 44 C. C. A. 51); a foreman or any other workman whom the master employs to watch and remove a rope in a derrick when it becomes worn or weak directs or permits the use of an old rope to raise a heavy weight, the rope breaks and entails injury upon a fellow workman (*Vogel vs. American Bridge Co.*, 180 N. Y. 373, 73 N. E. 1; *Johnson vs. Boston Tow-Boat Co.*, 135 Mass. 209, 46 Am. Rep. 458; *Oregan vs. Marston*, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854) in which the rule in such cases is laid down in these words: 'It is not the master's duty to repair defects arising in the daily use of the appliance

for which proper and suitable materials are supplied and which may easily be remedied by the workmen, and are not of a permanent character or requiring the help of skilled mechanics'); *McGee vs. Boston Cordage Co.*, 139 Mass. 445, 1 N. E. 745; *Webber vs. Piper*, 109 N. Y. 496, 17 N. E. 216). None of these acts constitute violations of the duty of the master. They illustrate the rule that the duty of so using a reasonably safe place and of so operating a reasonably safe machine that neither the place nor the machine shall become dangerous by their negligent use or operation is the duty of the servants who use or operate them, and not a part of the positive duty of the master. *Brady vs. Chicago &c. Co.*, 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712, and cases cited *supra*."

In *Portland G. M. Co. vs. Duke*, 164 Fed. 180, the rule which we contend controls this case was stated by the court in the following language:

"This statement makes it plain that the only negligence shown was that of the plaintiff's fellow servants. Any other conclusion would contravene the settled rule that as between master and servant, the duty of so using a reasonably safe place, of so operating reasonably safe machinery, and of so conforming to an established and reasonably safe method of work, that injury will not be inflicted negligently, is the duty of those to whom the work is intrusted, and is no part of the positive duty of the master. *American Bridge Co. vs. Seeds*, 75 C. C. A. 407, 144 Fed. 605, 11 L. R. A. (N. S.) 1041; *Kinnear Mfg. Co. vs. Carlisle*, 82 C. C. A. 81, 152 Fed. 933."

In *Dill vs. Marmon*, 73 N. E. 67, the Supreme Court of Indiana, in passing upon the question of

whether or not the details of simple work might be delegated to a servant, said:

"The case, so far as the matter of direction is concerned, is one where the place was rendered unsafe in the execution of the details of the service; and, since every place where an accident happens is at least momentarily unsafe, it cannot be said that that fact alone made it the duty of the master to be present in person or by representative to protect the servant. So, *Ind. R. Co. vs. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460. Appellant, in our opinion, assumed the risk that the foreman might give a negligent command relative to the handling of cars upon the siding. But even if we were to concede that the command of Haines related to a matter so essentially new that the appellant might fairly contend that he is not debarred of a recovery under the rule, '*Volenti non fit injuria*,' yet it does not follow that, because he may not have assumed the risk, he proceeded at the master's risk. A case like this is to be broadly distinguished from one where the command comes from the master or his special representative, or where the condition is of such a permanent character as to place or appliances that the master is in default in failing to warn the servant. In such cases the latter has a right to assume, at least ordinarily, that in following a special direction he will not be carried into an extraordinary and unapprehended peril. But it is nevertheless a rule of law that a servant cannot recover compensation of a master unless he can show that his injury was occasioned by the negligence of the master or of his representative. *Quincy M. Co. vs. Kitts*, 42 Mich. 34, 3 N. W. 240; *Ross vs. Walker*, 139 Pa. 42, 21 Atl. 157, 23 Am. St. Rep. 160; 4 Thompson Com. on Neg., Sec. 3758. Of course, the master may be thrown into default, notwithstanding all the care that he may have taken to perform his duties, as respects

those obligations which are personal to himself, but, as applied to an employment not essentially dangerous, it does not admit of doubt that, having taken due care to furnish and maintain a proper place, sufficient appliances, and proper servants, he may intrust the carrying out of the details of the work to those servants. The very denial of the superior servant doctrine, which this court has steadfastly frowned upon, involves the proposition that the master is not always required to be present while the ordinary duties of the employment are being carried on. In such a case it is not the master's voice which directs the servant to perform the particular act, and the employe knows that, in the nature of things, there has been no opportunity upon the part of the master to examine and consider whether the act is dangerous, so there is no basis for the assumption that the servant has undertaken the peril at the master's risk. As applied to the question in hand, we may well adopt the following language used by the Supreme Court of Massachusetts in *Flynn vs. Campbell*, 160 Mass. 128, 35 N. E. 453: 'The actual danger of the moment was due to a transitory act. Under the circumstances, the rule as to instructing inexperienced hands about the hidden dangers of their employment does not apply. *It were idle to declare the rule of law to be that a master who has fully discharged every duty which belongs to him may intrust the details of the execution of a part of the business to a foreman, if we also held that whenever an accident happens from a negligent order given by the foreman the master is to be charged with a default because he did not protect the servant from the transitory peril. If it be the law that the ordinary work of an employment not essentially dangerous may be carried on by means of a foreman who directs the servants in their work, the proposition becomes a practical matter to employers, and this assurance should not be nullified by con-*

verting the foreman into a vice principal whenever an accident happens.

We have before us the case of a foreman who worked with his men; who was not, in the sense of the law, at the head of a department, but was simply over two or three men; who was intrusted with no function which belonged to the master, but was superintending and assisting in the loading, weighing and handling of cars; and who had a man over him. We deem it clear that the master was not liable for any negligence upon the part of his foreman either in giving the order, or in failing to stop the car afterwards."

In *Wagner vs. City of Portland*, 67 Pac. 300, the Supreme Court of Oregon, in passing upon the question of whether or not the details of the point where certain electric wires should be detached and taken down was one which the master could delegate to the servant, in its opinion the court said:

"Beyond this, however, we are of the opinion that, so far as developed by the evidence in this case, *the cutting of wires, and the places where they should be cut so as to take them down conveniently and with the least danger to the workmen, are details of the work, which were for the judgment, discretion, and control of the workmen themselves, and not for the master to regulate by the adoption of rules for their guidance.* *Ulrich vs. Railroad Co.*, 25 App. Div. 465, 51 N. Y. Supp. 5; *Golden vs. Seighardt*, 33 App. Div. 161, 53 N. Y. Supp. 460."

In *Anderson vs. Oregon Ry. Co.*, 28 Wash. 468, the servants were engaged in unloading rails from a flat car. It was contended that it was the duty of the master to supervise the work and give directions

in regard to the details of carrying on the work. In passing upon this point the court said:

"The work of raising the rails a few feet and loading them on the flat car was simple, and not complicated, and any dangers connected with it were obvious to the common understanding. To do the work, and facilitate and make it easy, the men must lift and throw the rail in concert. The arrangement for doing this were mere matters of detail, to be performed by the men themselves, raising the rail. There was no duty imposed upon the master here which required the direction of the details in this simple work. There can be no fair inference from the evidence that the master assumed the direction of the details."

In 26 Cyc, 1151, the rule is announced as follows:

"The master is not bound to protect his servants further than by providing competent fellow servants and prescribing such regulations as experience shows may be best calculated to secure their safety, and the law does not require him to oversee and supervise the details of the work."

In Labatt, Master & Servant, 2d ed. Vol. 4, Sec. 1527, the rule is announced as follows:

"The general rule is that the master is not responsible for the errors which his servant of superior grade may commit, in regard to the choice or method for carrying out the work intrusted to his management."

In the note under this section the author cites numerous authorities, which we do not deem it necessary to reproduce in this brief.

The following cases support the same view:

Perry vs. Rogers, 51 N. E. 1021;

McGrath vs. Thompson, 80 Atl. 1105;

Tenn. Coal Co. vs. Bonner, 51 So. 144, 54 L. R. A., Note Page 108.

As stated by the trial court in his opinion in this case (page 24), the act of bringing up or taking down the few timbers used in the scaffold was a mere incident or detail of the work in which the servants were engaged, and the mode of doing this might well be left to the servants themselves without direction or supervision on the part of the master, unless we are prepared to hold that the master must supervise and superintend every detail of the work, and every act of his servants in the course of their employment. This case cannot be distinguished in any of its features from the case of *Hermann vs. Port Blakely Mill Co.*, 71 Fed. 853, or *Donnelly vs. San Francisco B. Co.*, 49 Pac. 559. The testimony of the witness Albert in the case at bar shows that a warning was given when the timbers were to be thrown down (32).

The authorities cited by the appellant are distinguishable from the facts in the case at bar. In *N. P. Ry. Co. vs. Peterson*, 162 U. S. 345, 40 L. ed. 994, cited by appellant at page 15 of his brief, the court, in defining who were fellow servants, said:

“In the *Baugh* case it is also made plain that the master's responsibility for the negligence of a servant is not founded upon the fact that the servant guilty of the neglect had control over and a superior position to that occupied by the servant who was injured by his negligence. The rule is that in order to form an exception to the general law of non-liability the person whose neglect caused the injury must be ‘one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a de-

partment.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case."

In the case at bar the lowering of these timbers was a mere separate piece of work, and therefore Fennell was a fellow servant of plaintiff within the rule announced in the above case.

In *Hoersgen vs. Southwestern P. C. Co.*, 205 Fed. 880, which is the case relied upon by appellant, and decided by the Circuit Court of Appeals for the Fifth Circuit, and not by this court, as stated by appellant, it appears that the foreman with full knowledge of the dangerous condition of a scaffold, and without any knowledge of that condition on the part of plaintiff, ordered the plaintiff to ascend the ladder and get upon the scaffold, which the plaintiff did, and by reason of the absence of certain cleats the scaffold fell and plaintiff was injured. All the court held in that case was that the master had knowledge of a dangerous condition of the scaffold, and that it was the duty of the master to inform the plaintiff of that condition before ordering him to go upon the same to perform the work. The case can have no bearing whatever upon the question here involved.

Without further discussion of the cases cited by appellant, it is sufficient to state that they are all distinguishable from the facts in the case at bar. Most, if not all of them, turn upon the safe place to work doctrine, which can have no application to the facts in this case. Plaintiff's working place was safe, ex-

cept for the negligence of Fennell. *Law vs. Illinois Cent. Ry. Co.*, 208 Fed. 869; *Railway Co. vs. Hart*, 176 Fed. 250. The master had a right to assume that Fennell, being a competent man, would perform the work in question, which was of such a simple character, with reasonable safety to the men employed with him. Plaintiff's injury was due solely and alone to the negligence of his fellow servants, and for that reason the judgment of the lower court should be affirmed.

Respectfully submitted,

EDWARD J. CANNON,

GEO. M. FERRIS,

C. E. SWAN,

Attorneys for Defendant in Error.

**United States
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

M. C. WOOD,

Plaintiff in Error,

vs.

POTLATCH LUMBER COMPANY,

a corporation,

Defendant in Error.

} No. 2337

**Petition of Plaintiff in Error
for Rehearing**

*Upon Writ of Error to the United States District
Court of the Eastern District of Washing-
ington, Northern Division.*

Comes now the above-named plaintiff in error and petitions this honorable court for a rehearing of the above-entitled cause in this court. Said petition is based upon the record and files in this cause and the argument of plaintiff in error heretofore and herein presented.

W. H. PLUMMER, *and*

JOSEPH J. LAVIN,

Attorneys for Plaintiff in Error.

ARGUMENT.

We approach the subject of this petition with a great deal of hesitancy, knowing as we do, the disinclination of courts to grant petitions for rehearing of causes after arguments have once been fully presented, and we would not present this petition did we not believe that it has exceptional merit and we were not fully convinced that the court has inadvertently committed a grave error in affirming the judgment of the lower court.

In this petition we will not discuss matters that have been fully considered and embraced within the opinion of this honorable court in its decision affirming the judgment, but will confine ourselves to matters which are not covered in said opinion, but which were presented in the briefs and argument of plaintiff in error upon the hearing of this cause before this court.

In the opinion of the court filed in this cause the court say:

“It is conceded that the act (of Fennell) constituted negligence upon the part of Fennell and that the plaintiff was free from blame, *and the only question therefore is, whether Fennell’s negligence is to be imputed to defendant.*”

“The court below held that under the fellow servant rule defendant was not chargeable therewith. The plaintiff excepts to this view, and further contends that the defendant is

negligent in not providing a safe place to work and in failing to prescribe a method or carry on the work in which the men were engaged."

In the briefs and arguments made in this cause three propositions were presented and three contentions made by plaintiff in error.

1. That Fennell was not a fellow servant with the plaintiff in error.

2. That if Fennell was a fellow servant with Wood that at the time he threw down the stick of timber his act in so throwing it down was an act of superintendence and direction and in so doing he was the representative of the master.

3. That even if Fennell was a fellow servant and at the time he threw down the stick of timber he was acting as a servant, then it was a question for the jury as to whether or not the master was or was not also negligent in placing men to work upon the conveyor at such a place, and in the performance of such work, as to make it dangerous for other employes who were required to go under said conveyor in the performance of their duties, and which negligence on the part of the master, concurred with the negligence of Fennell, and such negligence of the master contributed to the injury of plaintiff in error.

The opinion of the court is confined wholly to

the first and second propositions, and no mention is made of the third proposition.

It must be conceded as elementary law that the negligence of the master, which concurs with the negligence of a fellow servant, or which contributes to the injury of the plaintiff, renders the defendant liable, notwithstanding the immediate act which caused the injuries is an act of a fellow servant. This proposition brings this case fully and completely within the ruling of the Supreme Court of the United States in the case of *Texas Pacific Ry. Co. v. Howell*, 224 U. S. 577, 56 L. Ed. 892. We have just discovered in our brief in this case that the citation of the above case on page 24 of our brief is in error. In the brief it is cited as 224 U. S. 892, 56 L. Ed. 577, which we think accounts for the court not considering said case in its opinion.

The *Howell* case is directly in point with the case at bar and seems to be the last and most recent utterance of the Supreme Court of the United States on this subject.

In that case the Supreme Court holds, that it is a question for the jury to determine, whether or not the act of putting the men to work on top of a structure, under which other employes are required to work, or perform their duty, is negli-

gence, and a contributing cause of plaintiff's injury. This court cannot say, as a matter of law, that it *was not* a contributing cause; neither can this court say, as a matter of law, that the placing of the men at work, on top of a structure, at the place where they were working, is not an act of the master, for the reason that the Supreme Court holds that it is an act of the master and not an act of a fellow servant. If the men had not been placed to work up over the place, where it was well known plaintiff was required to travel, back and forth in the performance of his work, the timber would not have been thrown down at that place and plaintiff would not have been injured. If this court is going to follow the case of Railroad Company v. Howell, *supra*, and be governed by the instructions of the Supreme Court, in that case this court must hold that it certainly was a question for the jury, whether or not the failure of the master, to perform its full duty was a contributing cause of plaintiff's injury, and concurred with the negligence of the fellow servant Fennell, and if it so holds it must reverse this case.

Again we say the record shows that these timbers had been thrown down for a considerable period of time, until six or eight had been brought

down from the upper end of the conveyor, and thrown over the side of the conveyor, which must have taken fully half an hour according to the testimony of the witnesses, for the reason that they were thrown down about five minutes apart. Therefore, if the master, through its general superintendent, or whoever was in charge of the work generally representing the master knew, or ought to have known, or in the exercise of reasonable care and observation could have known, the dangerous work which was being carried on for half an hour, and the negligent acts of Fennell in throwing these timbers down, at a place where other employes were required to perform their duties, and who were endangered thereby, could not the jury have found that the master was negligent, in permitting the work to be carried on in this way? Could not the jury also find that half an hour's time is sufficient to charge the master with implied notice, or will the courts hold that a master or representative of the master, will be permitted to turn his back on his employes, and perform no act or duty, to find out, or observe just how the work is being carried on, or whether or not the lives and limbs of other employes are being injured by the manner in which the work is being carried on, that it has directed to be done?

This question was submitted to the jury in this case under the instructions of the court, but this court has wholly ignored this question in its opinion; which is the principal ground upon which we claim the judgment of the lower court should be reversed.

It is conceded that the work being carried on by this large saw-milling corporation is of great magnitude, numerous departments of services, numerous bosses and straw bosses. Therefore, we think it the duty of the master to see to it that his men under his direction are not so placed in the performance of their respective duties, that the work of one gang will become dangerous to the employes of another gang or class of work. If a General of an army should so place his men that they unknowingly, and without any intention on their part, should shoot each other, it certainly would be the fault of the General in command and not the negligence of any corporal in charge of a detachment. That is exactly what was done in this case. Wood was required to work at a place where he did not know, and could not have known of any danger. The men upon top of the conveyor were put to work at a place where their work endangered the person of Wood. They did not know that Wood would be injured or that he

was under the conveyor. It seems to us that it is a very inhumane and harsh rule to adopt, to say that the injury to Wood was caused solely and wholly by the negligence of Fennell in throwing the stick of timber over. Neither Fennell or his men had any right to be working up over a place where other men were required to pass and repass unless the master saw to it that some means of warning was provided to prevent him being injured.

In the Howell case, *supra*, it was not contended that the boss in charge of the men upon top of the coal chute were incompetent or that the premises were defective or unsafe immediately before or immediately after the accident, or that there was any danger other than from the falling timbers. Still the Supreme Court allowed the plaintiff to recover in that case. Neither was there any contention in the Howell case that the defendant had any reason to anticipate that the timbers and planks would be allowed to fall from the top of the coal chute down so as to injure Howell.

In the opinion of the Court in the case at bar the Court observes:

“Suppose that Fennell had carelessly let a hammer drop while installing the new wheel, and it had fallen upon and injured the plaintiff while working below; * * * precisely the same principle of liability would be involved.”

We desire to suggest in connection with this statement of the court that the above illustration is exactly what did occur in the Howell case, *supra*, and the Supreme Court said plaintiff had a right to recover, and that is all we ask this court to do in this case.

We do not desire to burden this court with unnecessary argument upon this petition, and believe that we have presented our points in such a manner as to advise the court fully of our contention and impress upon the mind of the court that in its decision in this case it has overlooked the most important contention made by us in our brief and argument heretofore filed and made.

In the case of American Car & Foundry Co. v. Uss, Eighth Circuit, 211 Fed. 862, the rule is enunciated as in the Howell case, *supra*, as follows:

“It has been twice laid down by the Supreme Court that, if the negligence of the master in failing to provide and maintain a safe place contributes to the injury of an employe, the master is liable, notwithstanding the concurring negligence of a fellow servant of a party injured. *Deserant v. Cerillos Coal Railroad Co.*, 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127; *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984.”

Must this court hold as a matter of law, and deprive the jury from passing upon the question, that the injury to plaintiff in error was due solely

and wholly to the fact, that this particular piece of timber was thrown down from the conveyor upon plaintiff? Can this court say it was not open to the jury to find that the usual duty to take reasonable care to furnish a safe place to the plaintiff in his work remained? Can this court say that the jury would have no right to be of the opinion that the general nature of the things to be done, gave no notice to the plaintiff that he was asked to take a necessary risk? Will this court say that the jury would have no legal right to find, that if the defendant saw fit to do the work above and below at the same time it did so with notice of the danger to those underneath, and took chances that could not be attributed wholly to the hand through which the harm happened? These are the very points decided by the Supreme Court in the Howell case, *supra*, and if that decision is the law these questions ought to be submitted to the jury, and they were submitted to the jury in the case at bar and decided favorably to the plaintiff in error.

We desire to say in conclusion that in the practice of the writer before this court, ever since its organization, this is the first petition for rehearing that he has ever filed. We know petitions for rehearing are not favored, but we realize, and I

can say freely that the trial judge and opposing counsel realize, that it is a harsh rule of law which deprives plaintiff of recovery under the facts in this case, and the tendency of the courts and recent decisions tend to a more liberal rule of law, to the end that masters shall use every reasonable means in their power, to prevent injuring their employes, and we earnestly urge in the interest of justice to both plaintiff in error and defendant in error that this petition for rehearing be granted, and reargument had and reconsideration of the questions suggested in this petition.

Respectfully submitted,

W. H. PLUMMER, *and*

JOSEPH J. LAVIN,

Attorneys for Plaintiff in Error.

The undersigned, attorneys for plaintiff in error, hereby certifies that in their opinion and judgment the foregoing petition for rehearing is well founded in law, and allege that it is not interposed for delay.

W. H. PLUMMER *and*

JOSEPH J. LAVIN,

Attorneys for Petitioner.



